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Recent Cases

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SECURITIES REGULATION—SAVINGS AND LOAN ASSOCIATION SAVINGS ACCOUNTS ARE SECURITIES WITHIN THE MEANING OF THE SECURITIES EXCHANGE ACT OF 1934

Tcherepnin v. Knight[1]

City Savings Association of Chicago, an Illinois chartered savings and loan association,[2] placed restrictions on the withdrawal of funds in 1958 because of its shaky financial status. Petitioners opened withdrawable capital share accounts with City Savings subsequent to the restrictions. On June 26, 1964, the State of Illinois took custody of City Savings under authority of the Illinois Savings and Loan Act and City Savings approved a plan of voluntary liquidation.[3]

Petitioners sought rescission of their share accounts[4] and return of their original investment on the theory that the accounts were "securities" within the definition of the Securities and Exchange Act of 1934[5] and had been sold to them in violation of SEC Rule 10b-5[6] pursuant to section 10b[7] of the Act. Petitioners contended that the opening of share accounts was a purchase of securities

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1. 389 U.S. 332 (1967).
2. Illinois Savings and Loan Act, ILL. ANN. STAT. ch. 32, §§ 701-944 (Smith-Hurd Supp. 1969).
3. ILL. ANN. STAT. ch. 32, § 848 (Smith-Hurd Supp. 1969).
4. "Share accounts," "withdrawable capital share accounts," "shares," and "savings accounts in a savings and loan association" are terms which are used herein interchangeably.
5. 15 U.S.C. § 78a (1964), hereinafter referred to as the 1934 Act.
6. Pursuant to the congressional delegation of authority contained in section 10b, on May 21, 1942, the SEC adopted rule 10b-5, 17 C.F.R. § 240.10b-5 (1949), which provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

7. 15 U.S.C. § 78j(b) (1964).

under section 10b. The petition further alleged that City Savings induced the purchase in violation of rule 10b-5 by mailing solicitations which portrayed City Savings as financially strong, but which failed to disclose that the Association was controlled by an individual who had been convicted of mail fraud, that federal insurance had been denied the Association because of its unsafe financial policies, and that the Association had been forced to restrict withdrawals of previous accounts.

Respondent, City Savings, and its liquidators moved to dismiss for lack of jurisdiction over the subject matter contending that the accounts were not securities as defined by the 1934 Act.[8] The district court denied this motion but certified the question for interlocutory appeal.[9]

The United States Court of Appeals for the Seventh Circuit reversed the district court and held the accounts were *not* securities.[10] The United States Supreme Court granted certiorari[11] and reversed, holding that savings accounts in a savings and loan association *are* securities within the meaning of the 1934 Act.[12] The Court considered only the threshold question of whether the definition of the Act covered savings accounts. It did not reach the issue of whether, the savings accounts being securities, the petitioners had stated a cause of action under the controversial rule 10b-5.[13]

The structure of a savings and loan association is relatively uncomplicated.[14] Savings and loan associations are of two types: mutuals and capital stock corporations.[15] They may be state chartered or federally chartered. All associations with a federal charter must be mutuals; but one-third of the states also allow state chartered capital stock corporations.[16] Furthermore, the associations can be insured or uninsured, because state chartered associations are not required to purchase insurance on their accounts, although most do.[17] City Savings was an uninsured, mutual, state chartered association.[18]

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8. 15 U.S.C. § 78c(a)(10) (1964).
9. The appeal was based on 28 U.S.C. § 1292(b) (1964).
10. Tcherepnin v. Knight, 371 F.2d 374 (7th Cir. 1967).
11. Tcherepnin v. Knight, 387 U.S. 941 (1967).
12. Tcherepnin v. Knight, 389 U.S. 332 (1967).
13. The Supreme Court has never determined who, if anyone, may bring private actions under section 10b and rule 10b-5. *See* SEC v. National Securities, Inc., 89 S. Ct. 564, 572 (1969). If, however, a recent major decision, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2nd Cir. 1968), reaches the Supreme Court, the Court will probably be forced to consider what constitutes a cause of action under rule 10b-5.
14. The early associations were small, informal groups that pooled the funds of a few individuals to make rotating housing loans to members. Many times the group was disbanded after all the members had received a loan. L. FARWELL, FINANCIAL INSTITUTIONS 575 (1967).
15. Ninety per cent of all savings and loan associations are mutual companies. C. DAUTEN, PRINCIPLES OF FINANCE 408 (1964).
16. *Ibid.*
17. Approximately 71 per cent of the total number of associations are insured. L. FARWELL, *supra* note 14 at 577.
18. Since the Illinois statute regarding savings and loan associations does not deviate materially from similar legislation in other states and on the federal level, the description here is equally applicable to all mutual savings and loan associations.

Both savers and borrowers are members of a mutual savings and loan association.[19] The members own the association. Each saver is allotted a certain number of shares, depending upon the size of his account, and each borrowing member is allotted one share.[20] Thus, the savings put into a mutual association establish shares of ownership. This distinguishes mutual savings from deposits in a commercial bank, which are liabilities of the bank and create a debtor-creditor relationship. Earnings by savings and loan shares are dependent upon the association making a profit in lending the saved money, and thus are dividends rather than interest.[21] This is so despite the fact that in recent years, as part of their competitive strategy to attract savings, associations have dropped the term "shares" in their literature and referred instead to their accounts as "savings accounts."[22]

The Securities Exchange Act of 1934 defines "security" as:

> [a]ny note, *stock,* treasury stock, bond, debenture, *certificate of interest or participation in any profit-sharing agreement* or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate, or subscription, *transferable share, investment contract,* voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchases, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.[23]

Whether Congress intended saving accounts to be included in the 1934 Act's definition of "security" is open to question. The legislative history of the 1934 Act is silent with respect to savings accounts, but the Senate report that accompanied the bill noted that the definition of security was "substantially the same as [that contained] in the Securities Act of 1933."[24] Because of this close similarity, and the fact that the same Congress which passed the Securities Act of 1933[25] approved the 1934 Act, the legislative history and judicial construction of the 1933 Act's definition of "security"[26] are pertinent to the question of whether

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19. ILL. ANN. STAT. ch. 32, § 741 (Smith-Hurd Supp. 1969), *See* § 369.015(5), RSMo 1959.
20. ILL. ANN. STAT. ch. 32, § 742(d) (Smith-Hurd Supp. 1969). *See* § 369.180 (4), RSMo 1959.
21. C. DAUTEN, *supra* note 15 at 408.
22. *Id.* at 408-09.
23. 15 U.S.C. § 78c(a)(10) (1964) (emphasis added).
24. S. REP. No. 792, 73d Cong., 2d Sess. 14 (1934).
25. 15 U.S.C. § 77a (1964) [hereinafter referred to as the 1933 Act].
26. 15 U.S.C. § 77b(1) (1964) reads:

> When used in this title, unless the context otherwise requires—
> (1) the term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract,

Congress meant to include savings accounts within the scope of the definition set out in the 1934 Act.

The 1933 Act expressly exempted securities of savings and loan associations from its registration provisions.[27] This was done largely in response to pleas made by the United States Building and Loan League on behalf of member associations who appeared before the House and Senate committees. Morton Bodfish, the League's Executive Manager, told the House Committee on Interstate and Foreign Commerce:

> When a person saves his money in a building and loan association, he purchases shares and nearly all of our $8,000,000,000 of assets are in the form of shares. . . .
>
> The practical difficulties of an association having to register every issue of shares . . . are obvious.[28]

While exempting savings accounts from the registration provision of the 1933 Act, Congress provided that this exemption was not applicable to the Act's anti-fraud provisions.[29] This too was in line with what Bodfish and the League had asked Congress:

> Now, gentlemen, we want you to *leave the fraud sections there,* just as they are, so that if any fraud developed in connection with the management of any of our institutions anywhere or under the name of building and loan, *this law can be effective* and operative.[30]

Bodfish's plea to the Committee, coupled with the final language of the 1933 Act clearly indicates an intention by Congress to include savings accounts within the Act's definition.

Later amendments to the 1934 Act tend to show that savings accounts were intended by Congress to be within that Act's definition of "security" also. In 1964, Congress amended the 1934 Act by adding registration provisions for certain securities traded in the over-the-counter market and again expressly exempted savings accounts in mutual savings and loan associations by paragraph (2) of section 12 (g) which says:

> The provisions of this subsection shall not apply in respect of . . .
>
> (c) any security, other than permanent stock—evidencing nonwithdrawable capital, issued by a savings and loan association . . .[31]

From the foregoing analysis it can readily be noted that the pattern of cov-

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voting-trust certificate, deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security" . . . .

27. 15 U.S.C. § 77c(a)(5) (1964).

28. *Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce,* 73d Cong., 1st Sess. 71 (1933).

29. 15 U.S.C. § 77*l*(2) (1964).

30. *Hearing on H.R. 4314, supra* note 25 at 74 (emphasis added).

31. 15 U.S.C. § 78*l*(g)(2) (1964).

erage and exemption of savings accounts in savings and loan associations in the two acts is almost identical. It is clear from the legislative history of both acts that Congress did not intend that savings and loan associations be burdened with registering stock every time a new customer opened a savings account or an established customer made a deposit. Therefore, if the statutory definition of "security" is broad enough to encompass savings accounts in savings and loan associations, members of such associations should be afforded the protection the 1934 Act antifraud provisions offer. Whether the definition is broad enough depends upon the statutory construction given the definition by the courts.

The *Tcherepnin* opinion makes it clear that the 1934 Act's definition of "security" will be broadly construed to effectuate its remedial purposes.[32] The Court relied heavily on its previous construction of the 1933 Act to determine the scope of the 1934 Act.[33] The two leading Supreme Court cases construing the definition of "security" in the 1933 Act are *SEC v. C. M. Joiner Leasing Corporation*[34] and *SEC v. W. J. Howey Company*.[35]

In *Joiner*, the defendant sold oil and gas leases to small investors, coupled with a promise to dig a test well. In determining that the interests sold in this transaction fell within the definition of "security," the Court specifically refused to invoke the rule *ejusdem generis* to limit the scope of the general terms of the definition to the dimensions of the specific, and stated that the remedial purpose of the legislation dictated a broad interpretation.[36] The Court pointed out that the general terms "transferable share," "investment contract," and "in general any interest or instrument commonly known as a security" would be interpreted on their merits, without reference to other specific terms within the definition. The opinion warned that "[i]nstruments may be included within any of these definitions, as a matter of law, if on their face they answer to the name or description."[37]

In *Howey*, one defendant sold interests in citrus groves with an option to hire the co-defendant to cultivate the groves followed by a distribution of the profits. In finding the interests sold in this transaction within the definition of "security," the Court laid down two important rules. The first was that the definition in the 1933 Act embodies a flexible concept to check sharp dealing by those who would avoid federal regulations by sidestepping static principles. The

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32. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). The Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted in the aftermath of the 1929 stock market crash to establish a regulatory scheme designed primarily to prevent inequitable and unfair practices in the purchase and sale of securities. See H.R. REP. No. 85, 73d Cong., 1st Sess. 1-2 (1933) (presidential message to Congress); S. REP. No. 792, 73d Cong., 2d Sess. 1-2 (1934) (presidential message to Congress).

33. SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959); SEC v. W. J. Howey Co., 328 U.S. 293 (1946); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943).

34. 320 U.S. 344 (1943).

35. 328 U.S. 293 (1946).

36. SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943).

37. *Id.* at 351.

Court stated that the definition was designed to adapt to and meet "the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[38] Secondly, the Court summarized the net effect of both *Joiner* and *Howey* by formulating a four point test for determining the existence of an "investment contract" as set out in the Act's definition of "security." An "investment contract," under *Howey*, is a transaction which "(1) involves an investment of money (2) in a common enterprise (3) with [the expectation of] profits (4) to come solely from the efforts of others."[39] The *Howey* decision made it clear that the nature of the commodity behind the instrument was irrelevant if this test was satisfied.[40]

In *Tcherepnin*, the Court, using the four point test stated above, found easily that savings accounts in savings and loan associations fit the "investment contract" classification within the 1934 Act's definition. A saver (1) invests money (2) in a common enterprise (mutual organization) (3) with profits (payment of dividends) (4) to come solely from the efforts of others (the savings and loan management).[41] Using the *Joiner* test, the Court found that savings accounts "on their face" also answered to the description of "certificate[s] of interest or participation in any profit sharing agreement," "stock," and "transferable share[s]," and were, therefore, "as a matter of law," within the 1934 Act's definition.[42]

Considering the legislative history of the 1934 Act and the Court's policy of broadly construing the Act to effectuate its remedial purposes, the inclusion of savings accounts within the Act's definition of "security" could have been anticipated. The most important effect of this decision is to allow the case to proceed to the ultimate issue of whether, the savings accounts being securities, the sale was a violation of rule 10b-5 which would entitle petitioners the right to rescind in a private action.

In section 3[43] of the 1933 Act savings accounts are exempted from registration. This means that savings and loan associations have no duty to make a voluntary statement or disclosure of information concerning their financial condition upon

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38. SEC v. W. J. Howey Co., 328 U.S. 293, 299 (1946).
39. *Id.* at 301 (The numbers have been added for emphasis and do not appear in the opinion).
40. Federal courts have found everything from silver foxes to whiskey warehouse receipts to be the basis of an "investment contract." *See* Penfield Co. v. SEC, 143 F.2d 746 (9th Cir. 1944), *aff'd*, 330 U.S. 585 (1947), whiskey warehouse receipts; SEC v. Universal Serv. Ass'n, 106 F.2d 232 (7th Cir. 1939), *cert. denied*, 308 U.S. 622 (1940), application blanks for contributions to "Plenocracy"; SEC v. Payne, 35 F. Supp. 873 (S.D.N.Y. 1940), silver foxes; SEC v. Los Angeles Trust Deed & Mtge. Exch., 186 F. Supp. 830 (S.D. Cal. 1960), *modified on other grounds*, 285 F.2d 162 (9th Cir. 1960), *cert denied*, 366 U.S. 919 (1961), discounted trust deed notes; SEC v. Pyne, 33 F. Supp. 988 (D. Mass. 1940), tung trees; United States v. Davis, 40 F. Supp. 246 (N.D. Ill. 1941), membership in cooperative association; SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65 (1959), variable annuities.
41. Tcherepnin v. Knight, 389 U.S. 332, 338 (1967).
42. *Id.* at 339.
43. 15 U.S.C. § 77c(a)(5) (1964).

which the public can rely in purchasing their securities.[44] But under section 12 (2),[45] the associations are liable to purchasers for misstating or omitting to state material facts needed to make what *is* stated not misleading.

With this liability specifically provided in the 1933 Act, it seems to be somewhat anomalous to subject the associations to liability by a series of implications in the 1934 Act. Conceivably it would not be a derogation of the 1933 Act if liability of associations under section 10b of the 1934 Act is limited to conduct set out in SEC Rule 10b-5 (2),[46] which describes, word for word the same conduct that is set out in section 12 (2) of the 1933 Act. But to carry the implied right to sue further and impose upon savings and loan associations liability for "total silence" because of a rule 10b-5 obligation to disclose all material facts would make the associations liable for failing to disclose the same information that section 3 of the 1933 Act exempts them from disclosing. On the other hand, as noted above, the legislative history of the 1933 Act indicates that savings and loan associations were granted the exemption from registering because of the practical difficulties of having to register every issue of shares when a customer opens or adds to his savings account.[47] If this is the reason for the exemption there may be some basis for subjecting savings and loan associations to liability under the "total silence" doctrine of rule 10b-5 in spite of the 1933 Act since formal registration would still be unnecessary.

The *Tcherepnin* petition alleged facts which constituted an omission of material facts needed to make the defendant's solicitation not misleading. Possibly rule 10b-5 liability will be found in this situation. But whether associations would in other circumstances be liable for "total silence" under rule 10b-5 is questionable.

J. DOUGLAS CASSITY

44. 15 U.S.C. § 77g (1964) imposes the obligation and 15 U.S.C. § 77aa (1964) states what information is required.

45. 15 U.S.C. § 77*l*(2) (1964).

46. *See* note 6 *supra* for substance of rule 10b-5.

47. *Hearing on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce,* 73d Cong., 1st Sess. 71 (1933).

TO CHARGE OR NOT TO CHARGE— SHALL WE HAVE TOLL ROADS IN MISSOURI?

Pohl v. State Highway Commission[1]

Plaintiff sought an injunction to restrain the Missouri State Highway Commission and the Missouri Turnpike Authority, acting under the provisions of the Toll Road Authority Act,[2] from issuing revenue bonds to build a toll road or from carrying out the provisions of an agreement into which defendants had entered. The trial court refused to issue the injunction. On appeal, the Missouri Supreme Court, sitting en banc, reversed the trial court's decision and remanded the case with directions to grant the injunction sought by plaintiffs.

The Toll Road Authority Act creates a Missouri Turnpike Authority, composed of the governor and the members of the State Highway Commission.[3] The Authority is given the power to build, operate and maintain turnpike projects at such locations as it may select; to issue revenue bonds to pay the costs of these projects; to set, collect, and change the tolls, fees, and rents to be charged thereon; and to lease any project to the commission for a consideration not less than the amount required to pay off all obligations of the Authority with regard to that project.[4] The act states that any bonds issued by the Authority shall not constitute a debt, liability, or obligation of the state or a pledge of the state's faith and credit, but shall be payable only from the revenues of the project and other funds pledged or provided therefore.[5] When paid for, a project may either be incorporated into the state highway system or operated by the Authority at a reduced toll rate, sufficient only to pay for repair and maintenance of the project.[6]

The Missouri Constitution establishes a state road fund, consisting of all state revenues collected from users of Missouri highways.[7] There are only six

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1. 431 S.W.2d 99 (1968).
2. §§ 225.010-.320, RSMo (1959).
3. § 225.020, RSMo (1959).
4. § 225.060(10), RSMo (1959).
5. § 225.200, RSMo (1959).
6. § 225.250, RSMo (1959).
7. Mo. Const. art. IV, § 30, reads in part:

For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state . . . shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:

First, to the payment of the principal and interest on any outstanding state road bonds.

Second, . . .

(1) To complete and widen or . . . maintain the state system of highways . . .

(2) To reimburse the various counties and other political subdivisions of the state, except incorporated cities and towns, for money expended by them in the construction or acquisition of roads and bridges . . . taken over by the state as permanent parts of the system of state highways . . .

(3) In the discretion of the commission to locate, relocate, estab-

purposes for which moneys in the state road fund can be used.[8] Under none of the six purposes can there be found language which permits expenditures for toll roads. The Toll Road Authority Act itself states that the toll road projects can become a part of the state highway system only after all debts of the Authority are paid.[9] Therefore, at first glance, it seems that state road funds may not be used to pay for the construction and operation of toll roads.

The Turnpike Authority is, however, given the power to lease the toll road projects to the State Highway Commission "for a consideration not less than the amount required to pay all obligations of the Authority respecting the project or projects leased in conformity with the resolution authorizing or trust agreement securing the outstanding revenue bonds issued therefor by the Authority. . . ."[10] Since the sole source of revenue for the Highway Commission, beyond any tolls and fees it may collect by operating the leased projects, is the state road fund, there is a problem as to where the commission will get the money to pay the amount set by the lease.

The problem arises because the framers of the Toll Road Authority Act were conscious of the constitutional restrictions on state road fund moneys and tried to circumvent the restrictions by being vague as to the nature of the "other funds" which the Highway Commission could use to pay the rent charged for the toll roads. While the vague language of the Act seems to indicate that only moneys collected in connection with the operation of the projects can be used to pay off the expenses of the toll road projects,[11] in one section there is a slight indication

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lish, acquire, construct and maintain the following:

(a) supplementary state highways and bridges . . . ;

(b) state highways and bridges in, to and through state parks, public areas and reservations, and state institutions . . . ;

(c) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states;

(d) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;

(e) any highway in any city or town which is found necessary as a continuation of any state or federal highway . . .;

(f) additional state highways, bridges and tunnels, outside the corporate limits of cities having a population in excess of 150,000, either in the congested traffic areas of the state or where needed to facilitate and expedite the movement of through traffic;

(4) to acquire materials, equipment and buildings necessary for the purposes herein described; and

(5) For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper.

8. See note 7 *supra.*

9. § 225.250, RSMo (1959). Whether the toll road is brought within the Missouri highway system at this point is left to the discretion of the Highway Commission.

10. § 225.060(10), RSMo (1959).

11. § 225.060(5), RSMo (1959); § 225.200, RSMo (1959).

that other Highway Commission funds might be expended.[12] The lease agreement, executed by the State Highway Commission and the Turnpike Authority in exercise of the power given them by the Act,[13] clears up the vagueness, however, by expressly stating that the rental fee for the toll road projects shall be paid from the state road fund.[14] Consequently, the supreme court was left with no choice but to declare the Act in violation of the Missouri Constitution by attempting to permit an unauthorized use of state road funds.[15]

The decision still leaves those who feel that Missouri needs toll roads with some alternatives. The obvious approach is to seek a constitutional amendment expressly providing for toll roads. The amendment could change the existing language of article 4, section 30 of the Missouri Constitution to include expenditures for such projects. Another type of amendment could be the addition of a provision similar to that found in the New York Constitution which permits the legislature to make the state liable, up to a certain amount, for the debts incurred by a public corporation created to build toll roads.[16]

Another method would be to reword the present act, leaving out the language which implies that state road fund moneys may be used to pay off the debts incurred by the Turnpike Authority in building and maintaining the toll roads. This would mean that only the revenues derived from the operation of the projects could be used to pay off the debts of the Authority. New York has used this method to finance the construction and operation of several of its parkways.[17]

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12. § 225.250(1), RSMo (1959).
When all revenue bonds issued by the authority for any project under the provisions of this chapter . . . shall have been paid . . . the highway commission may continue to operate the project as a toll road project until the commission recovers a sum equal to any commission funds which may have been used to pay all or a part of the bonded indebtedness of the project.

13. § 225.060(10), RSMo (1959).

14. The language of the Agreement is as follows:
4.(b) Commission shall agree to pay from the State Road Fund a reasonable rental for the completed facility involved, which said rental shall be sufficient to retire the obligation created by the revenue bonds issued for the project by Authority in accordance with their terms and the trust agreement relating to same, in no event to exceed a term of 40 years.

15. Pohl v. State Highway Commission, 431 S.W.2d 99, 106 (1968).

16. N.Y. CONST. art. 10, § 6. The pertinent portion of the section is as follows:
Notwithstanding any provision of this or any other article of this constitution, the legislature may by law, which shall take effect without submission to the people: (a) make or authorize making the state liable for the payment of the principal of and interest on bonds of a public corporation created to construct state thruways, in a principal amount not to exceed five hundred million dollars, maturing in not to exceed forty years after their respective dates, and for the payment of the principal of and interest on notes of such corporation issued in anticipation of such bonds, which notes and any renewals thereof shall mature within five years after the respective dates of such notes; . . .

17. N.Y. Pub. Auth. Law §§ 125-138 (McKinney 1956); N.Y. Pub. Auth. Law §§ 150-165 (McKinney 1956); N.Y. Pub. Auth. Law §§ 225-244 (McKinney 1956).

By providing that the bonds are payable only from revenues derived from the operation of the project, the Turnpike Authority would come within the "special fund doctrine"[18] which is often relied upon by municipal corporations in financing the construction and expansion of revenue producing facilities, such as electric light and power plants. The Missouri courts have invoked this doctrine to hold that bonds payable solely from the income of projects constructed with the bond proceeds are not debts within the meaning of constitutional language that limits the incurring of debt.[19] It would seem, however, in view of the considerable security demanded by bond underwriters in toll road ventures, that the highway projects which could be successfully financed without state road fund liability would fall far short of fulfilling the needs for which the Toll Road Authority Act was designed.

By holding the Toll Road Authority Act unconstitutional, the supreme court has *not* said that Missouri shall not have toll roads. It has simply stated that future attempts to establish such a system in Missouri must give more than token deference to constitutional prohibitions. In light of the fact that revenue from toll roads will, in all likelihood, be insufficient to fully finance present toll road needs, it appears that a constitutional amendment is the preferable approach.[20]

HENRY S. CLAPPER

18. Wring v. City of Jefferson, 413 S.W.2d 292 (Mo. 1967).

19. State *ex rel.* City of Hannibal v. Smith, 335 Mo. 825, 74 S.W.2d 367 (1934); Bell v. City of Fayette, 325 Mo. 75, 28 S.W.2d 356 (1930); State *ex rel.* Smith v. City of Neosho, 203 Mo. 40, 101 S.W. 99 (1907); *See* Foley, *Revenue Financing of Public Enterprises,* 35 MICH. L. REV. 1, 7 (1936).

20. As this article goes to press, there are five bills before the Missouri Legislature which deal with the issue of toll roads, either expressly or by implication. House Joint Resolution 1 is an amendment to MO. CONST. art. IV, § 29. The amendment would give the Highway Commission the authority to pledge any part of the state road fund to the payment of revenue bonds issued to finance toll road projects. Senate Joint Resolution 9 is an amendment which repeals section 29 of article IV of the constitution and adopts a new section. The new section is identical to the old, with the addition of one more grant of authority, to wit: the "authority to construct and operate toll roads where practical and feasible. . . ." House Joint Resolution 29 would accomplish the same thing as Senate Joint Resolution 9, but it simply adds a new section to the constitution. This bill would amend article IV of the constitution by adding section 29(a), which authorizes the Highway Commission to issue revenue bonds for the construction of toll roads and to pay off the bonds with moneys from the state road fund. House Joint Resolution 23 amends article IV of the constitution by adding new section 30(c), which authorizes the General Assembly to contract debts on behalf of the state by issuing bonds in an amount not to exceed five hundred million dollars "for the purpose of improving the existing state highway system and the construction of additions thereto." It also provides that such debts can be paid from revenues obtained from the highway users tax. The full faith of the state is pledged to the payment of such bonds.

House Bill 405 is an act to repeal section 142.025, RSMo (1959), and to replace it with a new section 142.025 which raises the license tax on motor fuel from five cents a gallon to seven cents a gallon. This bill is to take effect only after the constitutional amendment embodied in House Joint Resolution 23 is adopted. Neither of these latter two bills speaks of toll roads expressly, but it is possible that the language in House Joint Resolution 23 could be read as broad enough to allow the Highway Commission to expend the funds obtained from the bonds for the construction of toll roads as "additions" to the "existing state highway system."

EQUAL PROTECTION—A NEW APPLICATION TO ILLEGITIMATES

Levy v. Louisiana[1]

Levy brought suit in a Louisiana Civil District Court on behalf of five illegitimate children, seeking to recover two kinds of statutory damages: (1) Those to the children for the wrongful death of their mother; and (2) those based on the survival of a cause of action for pain and suffering that their mother had at the time of her death.[2] The Civil District Court dismissed the suit and the Louisiana Court of Appeals affirmed, construing the word "children" in the statute to mean "legitimate children" only.[3] The Louisiana Supreme Court denied certiorari.[4] Appeal was taken to the United States Supreme Court with jurisdiction based on the fact that the statute, as construed, created a substantial federal question when sustained against challenge under both the Due Process and Equal Protection Clauses of the fourteenth amendment to the United States Constitution.[5] The Supreme Court reversed in a 6-3 decision, holding that it was a denial of equal protection of the law to prohibit illegitimate children from suing for the wrongful death of their mother.[6]

At early common law, the illegitimate child had none of the rights possessed by legitimate children. He was considered to be *filius nullius*, the son of no one, or *filius populi*, the child of the people. He was entitled neither to support nor inheritance under the laws of succession.[7] In short, the bastard child possessed none of the rights that a person normally has simply because he is a member of a family.[8]

Today, all United States jurisdictions have mitigated, at least in part, many of these common law limitations. Some jurisdictions have gone farther than others. In *Levy*, the Supreme Court has decided that states which have not mitigated an illegitimate child's disability in the area of maternal wrongful death are in violation of the United States Constitution. It is the purpose of this casenote to examine the entire area of wrongful death, plus three other areas of the law affect-

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1. 391 U.S. 68 (1968).

2. LA. CIV. CODE art. 2315. This statute is similar to that in most jurisdictions setting up both a wrongful death action and a survival action to run in favor of, among others, "the surviving spouse and *child or children* of the deceased, or either such spouse or such child or children" (emphasis added).

3. Levy v. State, 192 So.2d 193 (La. App. 1966).

4. Levy v. State, 250 La. 25, 193 So.2d 530 (1967).

5. U.S. CONST. amend. XIV, § 1.

6. In a companion case, the court also held that it was a denial of equal protection of the laws to deny a mother the right to sue for her illegitimate child's wrongful death. Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968). Justices Harlan, Black and Stewart dissented in both cases.

7. 10 AM. JUR. 2d *Bastards* § 8 (1963).

8. Such treatment was sought to be justified on grounds such as uncertainty of paternity, discouraging promiscuity, and protection of the stability of the family unit. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1966).

ing illegitimate children[9] and to analyze the impact, if any, *Levy* is likely to have on the law as it presently stands.

It is, of course, elementary constitutional law that a state may make classifications, so long as the classifications include all persons who are similarly situated, and there is justification for such differential treatment. In other words, a state "cannot play favorites . . . without rhyme or reason."[10] It is also elementary that the Supreme Court will give greater latitude to a state to make classifications in the area of "social and economic" legislation than it will in the area of "civil rights."[11] It is hardly arguable that the laws dealing with illegitimacy do not treat all illegitimates the same. Inquiry must therefore be directed to the question of whether the classification of illegitimates under particular laws is justified. Justification seems to have always been assumed to exist by virtue of the states' broad powers to deal with social and economic problems. This assumption seems to be implicit in Justice Harlan's statement in the minority opinion in *Levy* that the states could "define . . . classes of proper plaintiffs in terms of their legal rather than their biological relation to the deceased."[12] It is in relation to this assumption that the *Levy* decision takes on special significance. The majority, speaking through Mr. Justice Douglas, considers that the rights of illegitimates under wrongful death statutes are a question of "basic civil rights" to which the Court has been "extremely sensitive."[13] By characterizing the matter as a question of "civil rights" rather than a social or economic problem, the Court greatly limited the state's power to classify. From this point the majority concluded that a statute which gave legitimate children a cause of action for their mothers' wrongful death, but withheld

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9. This casenote will consider only the illegitimate child's right to inheritance, support, workmen's compensation benefits, and wrongful death recoveries. Because there is considerable litigation in these areas, they offer relatively large bodies of law exemplifying the conditions of inequality that presently exist at the state level. It should be noted, however, that equal protection arguments may apply with similar force in any situation where an illegitimate child is treated differently than a legitimate one. For example, it has been suggested that the equal protection clause might apply in the areas of paternal custody, visitation and adoption, and to the child's right to use his father's name. *See* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1966). It would also seem possible that this doctrine could be extended to apply in states which have a blanket prohibition against testamentary gifts to illegitimate children, or those that limit the percentage of the estate which can be willed, if there are legitimate children. A further extension would seem possible in those states that have statutes providing for a testator's children not mentioned in the will, and where the court has interpreted the statute to refer to legitimate children only. This result was reached in Baker v. Stucker, 213 Mo. App. 245, 248 S.W. 1003 (K.C. Ct. App. 1923), which dealt with a maternal will. However, *Baker* was apparently overruled in Martin v. Claxton, 308 Mo. 314, 274 S.W. 77 (1925), though for some reason, it was not mentioned explicitly. Today there would not be a problem in Missouri because the statute now applies only to children born or adopted after the will was executed, or those thought to be dead at the time of execution. § 474.240, RSMo 1959. As to illegitimate's rights under federal statutes, see Note, 76 HARV. L. REV. 337 (1962).

10. Goesart v. Cleary, 335 U.S. 464, 466 (1948).

11. Levy v. Louisiana, 391 U.S. 68 (1968).

12. *Id.* at 79.

13. *Id.* at 71.

a similar cause of action from illegitimate children could not be justified, and the classification constituted invidious discrimination against illegitimate children.

On its facts, the decision is rather narrow as there appear to be few other states besides Louisiana that deny an illegitimate child the right to sue for their mother's wrongful death.[14] The ripple created by *Levy*, however, does not stop here. Rather, important questions are raised as to whether other areas of the law affecting illegitimates can stand in their present form in light of this decision.

One of these areas is the law of intestate succession. It has already been noted that, at common law, an illegitimate child had no rights of inheritance. In fact, the law went further and said that no one except his direct, lineal descendants could inherit from the illegitimate himself. These laws were based on the assumption that a bastard had no family.[15] This obviously inequitable situation caused American jurisdictions to have second thoughts. As a result, almost all states now provide for unrestricted intestate succession between a bastard child and his mother.[16] Of these states, about one-half also permit inheritance from relatives of the mother.[17] This, however, leaves a large number of states where an illegitimate child cannot inherit from a maternal relative, or at least, where the variety of maternal relatives from whom inheritance can be received is restricted.[18] Such rights are, of course, basic with any legitimate child.

With regard to his father, the illegitimate child fares even worse. With very few exceptions,[19] a bastard's right to inherit from his father is dependent upon legitimation through acknowledgment, or acknowledgment and intermarriage of the parents.[20] In fact, the requirements for acknowledgment and intermarriage have been so strenuously applied that it has even been held that an adjudication and proof of paternity are insufficient to create "inheritable blood."[21] Inheritance

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14. *See* Adams v. Powell, 67 Ga. App. 460, 21 S.E.2d 111 (1942); Washington B. & A. R. Co. v. State, 136 Md. 103, 111 Atl. 164 (1902).

15. 10 AM. JUR. 2d *Bastards* § 8 (1963).

16. 6 R. POWELL, REAL PROPERTY § 1003 at 660 (1968). Louisiana, LA. CIV. CODE ANN. arts. 918, 922 (1955), and New York, N.Y. DECE'D EST. LAW § 83(7), (13) (McKinney 1956), still are somewhat restrictive. Missouri's statute provides: "Illegitimate children are capable of inheriting and transmitting inheritance on the part of their mother . . . in like manner as if they had been lawfully begotten of her." § 474.060, RSMo 1959.

17. 6 R. POWELL, REAL PROPERTY § 1003 (1968) at 662. Moore v. Moore, 169 Mo. 432, 69 S.W. 278 (1902), apparently puts Missouri in this class.

18. It is interesting to note that, of these states, most are very liberal in permitting relatives to take from the child. For a brief but informative discussion of intestate succession and the illegitimate see 6 R. POWELL, REAL PROPERTY § 1003 (1968).

19. Arizona, ARIZ. CIV. STAT. § 14.206 (1956), and Oregon, ORE. REV. STAT. 111.231 (1967), provide for unrestricted inheritance.

20. 10 AM. JUR. 2d *Bastards* § 159 (1963); 6 R. POWELL, REAL PROPERTY § 1003 at 660-662 (1968). Section 474.070, RSMo 1959 puts Missouri in this category. For the statute to be satisfied, three requirements must be met: (1) Actual paternity, (2) intermarriage of the parents, and (3) recognition by the father that the child is his. Lawtrip v. Green, 363 Mo. 619, 252 S.W.2d 524 (1952).

21. *In re* Karger's Estate, 253 Minn. 542, 93 N.W.2d 137 (1958).

from paternal relatives is practically non-existent in the absence of such formalities.

The question is thus raised, does the treatment of illegitimates under the law of intestate succession deal with "basic civil rights" and, if it does, is there a justifiable reason for differentiating between legitimate and illegitimate children? At first glance, it would appear that the first part of the question would be answered in the negative. Yet, in light of *Levy,* how can it be said that wrongful death statutes deal with civil rights while intestate succession laws do not? Logically, it is difficult to differentiate the two situations. Indeed, there is evidence that at least some members of the Supreme Court see no distinction. This evidence comes in a statement by Mr. Justice Harlan in the dissenting opinion in *Levy* when he says, "That suits for wrongful death, *actions to determine heirs,* and the like, must as a constitutional matter deal with every claim of biological paternity or maternity on its merits is an exceedingly odd proposition."[22] The best conclusion would seem to be that if wrongful death is to be considered a question of civil rights, intestate succession laws should be also.

Even assuming basic civil rights are involved here, it is still necessary to determine if there is a valid justification for the classification of illegitimates under inheritance laws that would distinguish this situation from the reasoning in *Levy.* In determining this, it is necessary to approach the maternal and paternal situations separately.

As regards maternal inheritance, there would appear to be no valid justification for treating legitimates and illegitimates differently, and at least one court has so decided since the *Levy* decision.[23] The only difference in the two situations is that in one, the inheriting child's mother is married, while in the other, she is not. There is seemingly no logical relation between a mother's marital status and her child's legal rights. Furthermore, the argument that laws denying an illegitimate child the right to inherit from the maternal side of the family tend to discourage promiscuity can only be said to be absurd. Such an argument entirely disregards the *child's* rights and centers on the conduct of the *mother.*

With paternal inheritance there is slightly more justification for differential treatment because of the problem of proving paternity. When the law developed denying paternal inheritance, this problem was undoubtedly quite serious and probably justified the law. Today, however, it is at least questionable whether this distinction can be justified. The use of modern medical techniques, coupled with other extrinsic evidence, generally assures that a court of law can identify the father of the illegitimate child with reasonable certainty. The problem arises in those cases where the mother has no idea who the father is. Nevertheless even here it would seem that if a court, after a full hearing, is satisfied as to the identity of the father, a child could make out a very strong case that he is being denied equal protection of the laws by not being permitted to share in his father's estate.

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22. Levy v. Louisiana, 391 U.S. 68, 80-81 (1968) (emphasis added).
23. Michaelson v. Undhiem, 162 N.W.2d 861 (N.D. 1968).

Another justification frequently set forth is that laws denying illegitimates the right to inherit encourage family stability. It is argued that the wife and legitimate children of a father should not have their inheritance reduced because of the existence of an illegitimate child. Yet, it has been noted that the same argument has not been applied to deny inheritance to the father's legitimate children by a prior marriage although the effect upon the present wife and children is the same.[24] Moreover, this argument entirely disregards the situation where the putative father has no wife or children. It would seem that any reasons that could be set forth in favor of the common law focus on the rights and feelings of someone *other* than the illegitimate child. This loses sight of the fact that it is the illegitimate's rights that are in issue and with which courts should be concerned. While the rights of others admittedly must be considered and balanced, it would seem that these rights are frequently the only ones considered.[25]

The logical conclusion to be drawn from the foregoing discussion would appear to be that the inheritance and wrongful death situations are indistinguishable from a practical point of view. It is for this reason that it seems likely that *Levy* will have repercussions in the area of intestate succession.

Laws dealing with the support to which a child is entitled constitute another area in which illegitimates are denied the birthrights of legitimates. The differential treatment here varies considerably from state to state. At common law a parent had no duty to support his illegitimate child.[26] This stemmed from the idea that the bastard child had no family. Today, inequality often arises as a result of judicial

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24. Krause, *Equal Protection for the Illegitimate,* 65 MICH. L. REV. 477 (1966).

25. It is interesting to note that there has been some movement in the direction of permitting an illegitimate child to share in his intestate father's estate without the compulsion of a constitutional decision requiring such provisions. Thus, section 2-109, Working Draft Number 5 of the UNIFORM PROBATE CODE (1968), provides as follows:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through or from a person . . .
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> (3) . . . a child of a mother is also a child of the father even though there has been no lawful marriage between the parents:
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> (i) if the parents of the child participated in a marriage ceremony before or after birth of the child, even though the attempted marriage is void;
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> (ii) if the paternity is establish by an adjudication of paternity prior to the date of death of the person whose property is being distributed;
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> (iii) if there was a court order that the father support the child;
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> (iv) if there is an admission of paternity by the father in open court or an acknowledgment of paternity in writing signed by the father, except that paternity so estabished shall be ineffective to qualify the father or his kindred to inherit from or through the child unless the admission or acknowledgment occurs during the lifetime of the child;
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> (v) if there is clear and convincing proof that the father has openly and notoriously recognized or treated the child as his.

26. 10 AM. JUR. 2d *Bastards* § 68 (1963).

interpretation of non-support statutes, *i.e.*, by following the common law construction that "children" means legitimate children only.[27] Likewise, in cases where no statute has been enacted to change the common law, the common law has been adhered to almost unanimously,[28] and it has been held that the parent has no duty to support his illegitimate child not in his custody.[29] Missouri has taken a somewhat unique approach by imposing criminal liability for non-support of both legitimates and illegitimates,[30] but has held that an illegitimate child cannot seek support from his putative father through a civil action.[31]

It is also interesting to note that while some states provide remedies for a bastard child, they do not provide equal remedies. For example, some states have set a maximum age or number of years, some of which are quite low,[32] beyond which support need not be provided, while setting no limits for legitimate children. Here again, *Levy* raises the question of whether it is a denial of equal protection to treat illegitimates differently than legitimates when support is involved. The answer would certainly have to be that it is. Surely it is no less a "civil right" for a child to be able to require a parent to provide support than it is to permit the child to sue for that parent's wrongful death. In fact, it would seem that the former would be much more basic and important than the latter. Nor would there appear to be a greater justification for denying support than there is for denying a wrongful death recovery. While there may be, as noted previously, some difficulty proving paternity, many states already have bastardy proceedings which, so long as the procedures specified in the relevant statutes are complied with, provide adequate safeguards against mistake. Moreover, the difficulty of proving a fact is a rather weak basis for justifying the denial of equal remedies to a particular class of potential plaintiffs. The problem of proof is one for the child's attorney to overcome, and not one which should bar the bringing of the suit in the first instance.

In this connection, it should be noted that *Levy* has already had an effect on the law of support. In the recent case of *R——— v. R———*[33] the Mis-

27. For a collection of cases so holding, see Annot., 30 A.L.R. 1075 (1924).

28. Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923), appears to be the only exception.

29. For a collection of cases so holding, see Annot., 30 A.L.R. 1069 (1924). This question arises very infrequently because of the small number of states that do not have such a statute.

30. § 559.353, RSMo 1959 (Supp. 1968-1969).

31. *See* Easley v. Gordon, 51 Mo. App. 637 (St. L. Ct. App. 1892); James ——— v. Hutton, 373 S.W.2d 167 (K.C. Mo. App. 1963); Heembrock v. Stevenson, 387 S.W.2d 263 (St. L. Mo. App. 1965).

32. IOWA CODE ANN. § 675.25 (1946), to age 16; GA. CODE ANN. § 74.303 (1964), to age 14; MASS. GEN. LAWS ANN. ch. 273 § 5 (1959), for period not to exceed six years.

Until recently a few other states had limits, some of them very low, beyond which an illegitimate child could not recover. For example, prior to 1961, Alabama had a maximum of $100 per year. Code of Ala. tit. 6, § 12 (repealed 1961). Oregon had a limit of $350 per year for two years, and $500 per year for each succeeding year. ORE. REV. STAT. 109.150 (amended 1961).

33. 431 S.W.2d 152 (Mo. 1968). This case overrules by name all cases cited note 31 *supra.*

souri Supreme Court, citing *Levy*, held that an illegitimate child could no longer be denied the right to maintain a civil action for support against his putative father.[34] It is fairly certain that other states will have to follow this direction when the occasion arises for such a holding.

Yet another area of the law that may be affected by *Levy* is that of workmen's compensation. Since each state's statute varies, any broad generalization would be futile. However, the workmen's compensation and wrongful death areas are sufficiently analogous to suggest several general conclusions. First, both are purely and simply statutory remedies; and second, both provide for benefits to a deceased's family. The difference in requirements of proof and amount of damages would not seem a sufficient distinction to justify permitting illegitimates to sue under one, and not under the other. Thus, any state which denies an illegitimate child recovery of benefits, simply because he is illegitimate,[35] will likely run afoul of the holding in *Levy*.

Under some workmen's compensation statutes, however, proper plaintiffs are defined in terms of some extraneous factor such as dependence or right to inherit from the deceased. Here *Levy* could have a somewhat indirect effect. Thus, if a state is, since *Levy*, required to allow actions for support which previously would not have been allowed, it seems likely that more illegitimates will qualify under the workmen's compensation statute as a "dependent." The Missouri situation is an excellent example. Under its compensation statute, either legitimates or illegitimates may recover if they are either dependent on the deceased for support, or are living with the parent at the time of his death.[36] Thus, the statute is not, on its face, discriminatory. Yet, Missouri's support statutes, to which reference must necessarily be made in the case of illegitimates, have discriminated. But now, under *R*——— *v. R*———, an illegitimate child can force his father to support him. As a result, he is also a dependent within meaning of the compensation statute. The same reasoning would apply in any state that defines beneficiaries in terms of an extraneous factor which may be changed as a result of *Levy*.[37]

Finally, the effect of the *Levy* decision on the entire area of wrongful death must be considered.[38] As previously stated, few states besides Louisiana still adhere

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34. Since proof of paternity is necessary before there can be an action for support, and since Missouri has no bastardy proceeding, an interesting procedural problem is likely to arise as to how paternity can be determined.

35. *See, e.g.*, Miller v. Industrial Commission, 165 Ohio St. 584, 138 N.E.2d 672 (1956); Travelers Insurance Co. v. Peters, 280 S.W. 310 (Tex. Civ. App. 1926).

36. § 287.240, RSMo 1959. See Henderson v. National Bearing Division, 267 S.W.2d 349 (St. L. Mo. App. 1954) for a case dealing with the rights of illegitimates under this statute.

37. *E.g.*, Hunt v. U.S. Steel Corp., 274 Ala. 328, 148 So.2d 618 (1963), child could recover if he could inherit from the parent.

38. While this casenote does not cover federal statutes, it should be noted that the courts have generally been very liberal when applying federal death statutes. *See, eg.*, Hammond v. Pennsylvania R. Co., 31 N.J. 244, 156 A.2d 689 (1959) and Tune v. Louisville & Nashville Ry. Co., 223 F. Supp. 928 (M. D. Tenn. 1963), both of which permitted recovery by an illegitimate child for a father's death under the Federal Employer's Liability Act, and Middleton v. Luck-

to the rule denying recovery to illegitimate children whose mother has been negligently killed. Rather, most have found a legislative policy embodied in their maternal inheritance statutes, and construe their wrongful death statutes so as to include illegitimates.[39] But the problem is not so narrow in the case of a father's wrongful death. Here, the judicial attitude is reversed, and most states still deny recovery to the illegitimate child.[40] The question that must be faced, then, is whether there are stronger reasons for denying recovery for the father's death than in any of the situations previously discussed, or than in the situation presented in *Levy*. Once again, the old argument of proving paternity might be raised; however, it is no stronger in the wrongful death situation than when raised in reference to support or inheritance. It is doubtful, therefore, that it will justify the results now being reached by most courts. Thus, in the situation where the father has acknowledged the child or has been legally adjudged to be the father, there is little reason for a rule that would deny the child recovery for the father's death but not for the mother's. But what of the situation were paternity has not been proven, and the putative father not only has not acknowledged the child, but does not know and perhaps does not care about his child's existence? Is this child to be permitted to enter suddenly the scene upon his father's death and share, or perhaps take the entirely of a wrongful death recovery? It could well be argued that wrongful death recoveries should at least be limited to those cases where paternity has been proven or acknowledged during the father's lifetime. It will undoubtedly be felt by some that a child should not be permitted to "smear" the putative father's name after his death. The weakness of this argument lies in the fact that it is more of an emotional reaction than a legal argument. If one assumes that the child proves paternity to a court's satisfaction, which admittedly may be difficult to do after the father's death, then the pivotal question is: is this a right granted to legitimate children and denied to illegitimate ones? If the answer is yes, as it is in the case with paternal wrongful death, then, unless some strong logical, as opposed to emotional, justification can be set forth the result will be the same as in *Levy*. It is doubtful that any such justification can be found, though one state appellate court has decided to the contrary since *Levy*.[41]

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enbach S.S. Co., 70 F.2d 326 (2d Cir. 1934), *cert. denied* 293 U.S. 577 (1934), which permitted recovery by an illegitimate child for his mother's death under the Federal Death Act. *See generally* note, 76 HARV. L. REV. 337 (1962); and Annot. 72 A.L.R.2d 1235 (1960).

39. *E.g.*, Marshall v. Wabash R. Co., 120 Mo. 275, 25 S.W. 179 (1894); Sneed v. Henderson, 211 Tenn. 572, 366 S.W.2d 758 (1963); Galveston H. & S.A. Ry. Co. v. Walker, 48 Tex. Civ. App. 52, 106 S.W. 705 (1907).

40. *E.g.*, Young v. Viruet de Garcia, 172 So.2d 243 (Fla. App. 1965); Di Medio v. Port Norris Express Co., 71 N.J. Super. 190, 176 A.2d 550 (1961); Frazier v. Oil Chemical Co., 407 Pa. 78, 179 A.2d 202 (1962); Dilworth v. Tisdale Transfer & Storage Co., 209 Tenn. 449, 354 S.W.2d 261 (1962); Bonewit v. Weber, 95 Ohio App. 428, 120 N.E.2d 738 (1952).

41. Schmoll v. Creecy, 37 U.S.L.W. 2441 (N.J. App. 1969). The court distinguished *Levy* by pointing out that the New Jersey statute defined proper plaintiffs in terms of those who would take under intestate succession laws, while Louisiana defined proper plaintiffs as the deceased's children which the Supreme Court concluded covered illegitimate as well as legitimate children. The New Jersey

In looking at the law surrounding illegitimates generally, it should be noted that *Levy* is the first case dealing with the illegitimate's rights decided on an equal protection theory, though at least one writer had previously argued for the adoption of such a theory,[42] and at least one court considered the idea before deciding a case on other grounds.[43] As a result, it is difficult to say that the law will move in the direction suggested throughout this note. It is easy to say, however, that there is a very good possibility that it will, and even easier to say that it should. Any relationship between a legitimate social goal and the exclusive denial of certain rights to bastard children is extremely vague at best. Indeed, it is questionable if such relationships do in fact exist. The stigma of being labelled a "bastard" is bad enough. But for the law to add to that stigma by denying rights that are basic and fundamental to a legitimate child is something that cannot help but affront one's sense of justice. The rights of an innocent child should not be made dependent upon the acts or whims of his not-so-innocent parents.

KERRY D. DOUGLAS

BANKRUPTCY-TORT CLAIMS AS AN ACTUAL AND NECESSARY EXPENSE OF ADMINISTRATION

Reading Co. v. Brown[1]

The Supreme Court of the United States recently decided the case of *Reading Co. v. Brown.*[2] In this case, I. J. Knight Realty Corp. (hereinafter called Knight) filed a petition on November 16, 1962, for an arrangement under Chapter XI of the Bankruptcy Act.[3] Brown was appointed receiver and was authorized to conduct Knight's business, which consisted of renting out space in an eight story building. On January 1, 1963, the building was totally destroyed by fire. The fire allegedly was caused by the negligence of a workman who was hired by Brown to repair water pipes within the building.[4] The fire did extensive damage to the property

court also made reference to the fact that legislatures have wide latitude in social and economic areas. Query: whether the distinction is valid, and whether their interpretation of *Levy's* meaning is broad enough.

42. Krause, *Equal Protection for the Illegitimate,* 65 MICH. L. REV. 477 (1966).
43. Armijou v. Wesselius, 440 P.2d 471 (Wash. 1968).

1. 391 U.S. 471 (1968).
2. *Ibid.*
3. 11 U.S.C. §§ 701-799 (1964).
4. For the purpose of deciding if the resulting claims are allowable in the bankruptcy proceeding, it is assumed that the workman was negligent and the injuries resulted from his negligence. Reading Co. v. Brown, 391 U.S. 471, 474 (1968).

of Reading Company and others.[5] Reading filed a claim in the arrangement proceedings on April 3, 1963, for $559,730.83. The claim was filed by Reading as an administrative expense caused by the negligence of the receiver Brown while Brown was operating the business of Knight. If allowed as an administrative expense of the arrangement, Reading's claim would have been entitled to first priority; thus it would be paid before the lower priority claims (*e.g.*, wages with second priority and taxes with fourth priority) and the claims of general creditors.[6] The amount of Reading's claim added to the other first priority claims would have exhausted the assets of Knight and left the lower-than-first-priority and general claims valueless.

On May 14, 1963, Knight was voluntarily adjudicated a bankrupt. Brown was subsequently elected trustee in bankruptcy. The bankruptcy referee did not allow Reading's claim as an administrative expense of the arrangement. His decision was upheld by the District Court for the Eastern District of Pennsylvania[7] and the United States Court of Appeals for the Third Circuit.[8] Reading was then granted certiorari to the Supreme Court of the United States. The Supreme Court was faced with a very difficult and unusual problem presented by the facts of the *Reading* case. The Court had to decide between (1) affirming the court of appeals and saying that Reading had no claim in bankruptcy for its injuries, (2) allowing Reading's claim as an administrative expense of the arrangement, entitling it to first priority, or (3) holding that a claim which arises from the negligence of a receiver in an arrangement proceeding is a general claim in bankruptcy. If the Court held that Reading had no claim in the bankruptcy proceeding, Reading, although completely innocent when injured, would not recover for its injuries. If the Court allowed Reading's claim to have first priority, the Court would, because of the size of Reading's claim and Knight's limited assets, render the second priority claims for wages, fourth priority claims for taxes, and general creditor claims valueless. If Reading's claim were allowed as a general claim, Reading would share, pro rata with the general creditors the assets of Knight remaining after all priority claims had been paid. The Supreme Court reversed the court of appeals and said: "We hold that damages resulting from the negligence of a receiver acting within the scope of his authority as a receiver give rise to 'actual

5. There were 146 claimants other than Reading. The total of the claims was in excess of $3,500,000.00. It was agreed that the decision in this case would establish the status of the other 146 claims. Reading Co. v. Brown, *supra* note 4, at 473-474.

6. The overall purposes of the Bankruptcy Act are to allow an equitable, orderly, and pro rata distribution of the bankrupt's assets to his creditors and relieve the bankrupt of his debts. A claim that is allowed priority is paid in full from the assets of the bankrupt before a distribution is made to the general creditors. Thus, all priority claims operate against the purpose of a pro rata distribution of the bankrupt's assets. Because allowing claims to have priority does operate against a pro rata distribution, the courts have allowed claims to have priority only when the Bankruptcy Act clearly meant for the claim to have priority.

7. *In re* I. J. Knight Realty Corp., 242 F. Supp. 337 (E.D. Pa. 1965).

8. *In re* I. J. Knight Realty Corp., 370 F.2d 624 (3d Cir. 1967).

and necessary cost' of a Chapter XI arrangement."[9] Therefore, Reading's claim was entitled to first priority.

To determine what claims should be allowed to have priority in a bankruptcy proceeding, it is necessary to look to section 64a of the Bankruptcy Act[10] which provides in part:

> The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; . . . .

The words "actual and necessary" are not defined in the Act nor in the cases, so the Supreme Court found it necessary to look to the purpose of the Act and its relevant sections to find what should be included as "actual and necessary" expenses of adminsitration.

The Court agreed with Brown, the trustee, that the statutory objectives of Chapter XI arrangements are (1) to facilitate the rehabilitation of insolvent businesses, and (2) to preserve a maximum of assets for the general creditors should the arrangement fail. The Court said that the decisive statutory objective in this case is "fairness to all persons having claims against an insolvent."[11]

With this objective in mind, the Court rejected alternative theories advanced which would allow Reading other means of asserting its claim, but without allowing the claim first priority status or the right to share with the claims of the general creditors. The trustee suggested that because the claim was not a provable claim by section 63,[12] it would not be dischargeable under section 17,[13] and therefore would survive the bankruptcy proceeding. If the claim survived, Reading could, in theory, re-

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9. Reading Co. v. Brown, 391 U.S. 471, 485 (1968).

10. 11 U.S.C. § 104a (1964). This section is applied to arrangements by the Bankruptcy Act § 302, 11 U.S.C. § 702 (1964).

The Bankruptcy Act is Title 11 of the United States Code, but the section numbers in 11 U.S.C. differ from the section numbers originally given to the Act. The original section numbers of the Bankruptcy Act will be cited in the text of this note and a corresponding citation to 11 U.S.C. will be given in a footnote.

11. Reading Co. v. Brown, 391 U.S. 471, 477 (1968). Notice that the Court is saying "claims against an insolvent" and not claims against the arrangement or receiver. The Court also makes the following statements: ". . . [P]etitioner [Reading Co.] has a right to recover for that injury from their 'employer,' the business under arrangement, upon the rule of respondeat superior." Reading Co. v. Brown, *Id.* at 477 (footnote omitted), and "The 'master,' liable for the negligence of the 'servant' in this case was the business operating under a Chapter XI arrangement. . . ." Reading Co. v. Brown, *Id.* at 479. Thus the Court is clearly saying that Reading's right to recover is based upon the rule of respondeat superior, with Knight, being both the business under arrangement and the insolvent, as the master. In deciding that Reading's claim cannot be a provable claim in bankruptcy, the Court takes an inconsistent position in stating that for a claim to be provable it must be against the "debtor" and not against the estate in an arrangement proceedings. See notes 16 and 17, *infra,* and accompanying text.

12. 11 U.S.C. § 103 (1964).

13. 11 U.S.C. § 35 (1964).

cover from Knight after the bankruptcy proceedings. Another theory suggested, was that Reading might recover from the receiver personally or out of the receiver's bond. The Court declined to discuss or decide if either of these theories were possible, and said, ". . . they [the alternative theories] do not serve the present purpose."[14] The basis of the Court's approach to the matter was that Reading's claim was different from an injury claim against a person with little or no assets—*i.e.*, one has a right to recover, but from a practical view there is nothing from which to seek recovery. The Court stated that ". . . [Reading] did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon it by operation of law."[15] Thus, the Court said, it would be inconsistent with fairness in bankruptcy to exclude or subordinate these "tort creditors of the arrangement."[16]

The United States, having a tax claim with fourth priority, had entered the case on the side of the trustee Brown, suggesting the following theory upon which the Court could have held that Reading's claim was a provable claim in bankruptcy. This would allow Reading to share in Knight's assets with the general creditors, and the Court would have avoided the choice between allowing Reading's claim first priority and saying Reading had no claim in bankruptcy. Section 63a allows tort claims to be provable in bankruptcy proceedings if the litigation was started *before* the date of the petition in bankruptcy.[17] The United States noted

14. Reading Co. v. Brown, 391 U.S. 471, 479 (1968).

15. Reading Co. v. Brown, *supra* note 14, at 478.

16. Reading Co. v. Brown, 391 U.S. 471, 479 (1968). Notice that here the Court is using language indicating that the claim of the "tort creditors" is against the arrangement. In stating what the Court considered the decisive statutory objective of the Bankruptcy Act, the Court said, "fairness to all persons having claims against an insolvent." In applying the rule of respondeat superior the Court said, "The 'master,' liable for the negligence of the 'servant' in this case was the business operating under a Chapter XI arrangement. . . ." See note 11 *supra*. In deciding that Reading's claim would not be a provable claim under § 63a(7) of the Bankruptcy Act, the Court distinguished between a claim against a debtor and a claim against the estate. The Court said that a tort claim must be against the debtor and not against the estate in Chapter XI arrangement if the claim is to be provable under 63a(7). Thus, the Court indicates that Reading's claim was against (1) "the arrangement," and (2) the "insolvent," (3) "the business operating under a Chapter XI arrangement," and (4) "the estate in a Chapter XI arrangement." The Court also states that the claim was not against "the debtor." The assets of "the arrangement," the "insolvent," "the business," "the estate," and "the debtor" that Reading can recover from are the total assets of Knight. Therefore, the above nomenclature of the assets, which the claim is against, and the Court's distinction between claims against the "debtor" and the "estate," seem to be an immaterial reason for saying that Reading's claim could not be provable. The claim was filed against I. J. Knight Realty Corp., be it called the "insolvent," "the business," "the estate," the "arrangement," or "the debtor." The distinction the Court is making seems to be based on the fact that the tort was committed while a receiver was operating the business of Knight during an arrangement proceedings. Yet the Court says that the master that is liable is the business under an arrangement.

17. Bankruptcy Act § 63a, 11 U.S.C. § 103a (1964), provides in part:

> Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . . (7) the right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy; . . . .

that the Bankruptcy Act states that bankruptcy proceedings resulting from an unsuccessful arrangement (as in this case) shall be conducted "as far as possible" the same as bankruptcy proceedings that are not the results of an arrangement. Also, the Bankruptcy Act states the date of the petition in bankruptcy shall be considered to be the date of the original petition for the unsuccessful arrangement, when bankruptcy proceedings do follow an arrangement.[18] In arguing that Reading's claim was a provable general claim, the United States contended that the Court should use the qualification "as far as possible" and should say that with the facts of the *Reading* case it was not "possible" to consider the date of the arrangement petition as the petition date of the ensuing bankruptcy. The reason for this impossibility would be that if the petition date of the arrangement was used as the petition date of the ensuing bakruptcy, the petition date would antedate the tort (the fire) and Reading's claim would not be provable as a general claim. By using the qualification "as far as possible" in this way, the Court could say that the petition date of the bankruptcy was the date the arrangement proceeding changed to a bankruptcy proceeding. This date would not antedate the tort and Reading's claim could be a provable general claim.

The Supreme Court rejected this alternative, stating that: (1) section 63a, in determining what debts may be provable, applies to debts of the bankrupt, not to debts of the estate;[19] (2) The United States' theory would not work if bankruptcy does not follow the arrangement—the theory will work only where bankruptcy follows an unsuccessful arrangement and thus gives a petition-in-bankruptcy-date subsequent to the tort;[20] (3) There is nothing "impossible" in construing the sections to mean what the sections say: "a tort claim arising during an arrangement like a tort claim arising during a bankruptcy proceeding proper, is not provable as a general claim in the bankruptcy."[21]

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18. Bankruptcy Act § 302, 11 U.S.C. § 702 (1964), provides in part: "The provisions of Chapters I to VII, . . . shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter." Bankruptcy Act § 378, 11 U.S.C. § 778 (1964), provides in part:

> Upon the entry of an order directing that bankruptcy be proceeded with . . . (2) . . . the proceeding shall be conducted, as far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; . . .

19. See note 16 *supra*.

20. The theory would not be necessary if the arrangement was successful. Recovery could be had by an action for negligence against the business. Thus, the United States' theory would have given a means of recovery for any tort committed by a receiver in an arrangement proceeding, without holding that the claim was an "actual and necessary" cost of administration. The injured party would only have to begin litigation to assure himself of a means of recovery. If bankruptcy ensued from the arrangement, the injured party's claim would be a general claim in the bankruptcy. If the arrangement was successful, and thus the business again successful, the recovery could be had by normal means.

21. Reading Co. v. Brown, 391 U.S. 471, 481 (1968). The definition of the word "debt" is given in the Bankruptcy Act § 1(14), 11 U.S.C. § 1(14) (1968), as "any debt, demand, or claim provable in bankruptcy" and § 1 states it will be so construed "unless the same be inconsistent with the context." Therefore, an

The United States next contended that the claims which are allowed priority for "actual and necessary costs" are restricted to those costs which form "an integral and essential element of the continuation of the business" and suggested that each tort should be analyzed in its own context. Thus "an injury to a member of the public—a business invitee—who was injured while on the business premises during an arrangement would present a completely different problem (*i.e.*, could qualify for first priority)."[22] The Court answered that they could perceive no distinction between those torts integral to the business and those that are not. Thus, the Court decided that it was "theoretically sounder, as well as linguistically more comfortable," and "seems more natural and just" to treat claims arising from the torts of the receiver as an expense of the arrangement rather than as a debt of the bankrupt.[23]

The Supreme Court's holding in this case that a tort claim is an "actual and necessary" cost of administration is difficult to accept. The words "actual and necessary" are not defined in the Bankruptcy Act and no case can be found on point.[24] But in considering the purpose of the Bankruptcy Act,[25] its legislative history,[26] and the trend in recent years to limit priorities,[27] it seems clear that "actual and necessary" was not meant by Congress to include tort claims. The

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argument could be made that "the debts to have priority," as stated in Bankruptcy Act § 64a, 11 U.S.C. § 104a (1964), means only provable debts and those claims or demands that are specifically enumerated in § 64a. Thus, a tort claim during an arrangement would be neither a priority claim nor a general claim since it is not a provable claim by Bankruptcy Act § 63, 11 U.S.C. § 103 (1964). This is definitely not the intent or purpose of § 64a, nor the way § 64a has been construed, but it would meet the Supreme Court's literal interpretation of "construing the sections here involved to mean what they say."

22. Reading Co. v. Brown, *supra,* note 21 at 484.

23. Reading Co. v. Brown, 391 U.S. 471, 482 (1968).

24. There is authority for holding a receiver, or the estate, in equity receiverships liable for negligent torts committed by the receiver. See 2 J. CLARK, LAW OF RECEIVERS, 396 (3d ed. 1959) and cases there cited.

25. "The theme of the Bankruptcy Act is 'equality of distribution' . . . ; and if one claimant is to be preferred over the others, the purpose should be clear from the statute." Nathanson v. NLRB, 344 U.S. 25, 29 (1952).

> The purpose of the Bankruptcy Act is to distribute the assets of the bankrupt equitably among his creditors and then to relieve the honest debtor from the burden of his debt and permit him to start anew, . . . It is not necessary that both objects be attainable.

F. GILBERT, GILBERT'S COLLIER ON BANKRUPTCY, 4 (4th ed. 1937).

26. *See* W. COLLIER, 1 COLLIER ON BANKRUPTCY, §§ 0.01-0.08 (14th ed. 1962).

27. For cases, *see, e.g.,* Goldie v. Cox, 130 F.2d 690 (8th Cir. 1942); Wheeling Electric Co. v. Mead, 177 F.2d 718 (4th Cir. 1949); *In re* Friedman, 232 F.2d 151 (2nd Cir. 1956), *cert. denied,* 352 U.S. 835 (1956); United States v. Embassy Restaurant, 359 U.S. 29 (1959); *In re* Pusey and Jones Corp., 295 F.2d 479 (3rd Cir. 1961); *In re* Chicago Express, Inc., 332 F.2d 276 (2nd Cir. 1964), *cert denied,* 379 U.S. 879 (1964); Joint Industry Board v. United States, 391 U.S. 224 (1968). *See* Herzog, *Bankruptcy Law—Modern Trends,* 38 REF. J. 23 (1964); Herzog, *Bankruptcy Law—Modern Trends,* 38 REF. J. 85 (1964); Fishberg, *Cost of Administration—An Economy Problem,* 40 REF. J. 58 (1966). Another indication is the 1966 amendment to § 64a which limited the tax claims that are allowed as fourth priority.

overall purposes of the Bankruptcy Act are to allow an equitable, orderly, and pro rata distribution of the bankrupt's assets to his creditors, and to relieve the bankrupt of his debts. Because allowing claims to have priority does operate against a pro rata distribution, the courts have allowed claims to have priority only when the statute clearly meant for the claim to have priority. Here the effect of allowing Reading's claim to have first priority was to render all other lower priority claims valueless. Also, the other first priority claims will share pro rata with Reading's claim. Thus, the innocent holders of all claims other than first priority claims are denied recovery, and the holders of first priority claims cannot recover fully.

Although the Court's solution of allowing the claim to have first priority may meet their "fairness to all persons having claims against an insolvent"[28] test and may be "linguistically more comfortable,"[29] it has, without doubt, departed from the intent and purpose of the Bankruptcy Act and has left questions unanswered. The Court refused to decide: (1) if claims for an injury resulting from the negligence of the receiver could or would survive against the bankrupt; (2) if recovery could be had out of the receiver's bond; or (3) if recovery could be had from the receiver personally by stating the above means of recovery do not serve the present purpose.[30] It is interesting to note that the Court does cite language from *McNulta v. Lochridge*[31] saying that recoveries in actions against a receiver for negligence are payable only from the funds in his hands, but stresses that this language is dictum; thus, the Court does not rule out an action against the receiver personally.

The Court also very carefully worded their holding in terms of a receiver, acting within the scope of his authority as a receiver, in a Chapter XI arrangement. It did not indicate whether it would follow this case if the tort was due to the negligence of a receiver or trustee in other bankruptcy proceedings than Chapter XI arrangements. The reasoning for allowing priority claims in other bankruptcy proceedings would be the same as in the present case, but the objective of "fairness to all persons having claims against the insolvent" would be very difficult to achieve. For example, suppose that in the present case there had been another extremely large claim by a third party for injuries due to a second act of negligence of the trustee or his employees after the arrangement had moved into straight bankruptcy. There is a clause in section 64a(1)[32] which states that when an order is entered, in any proceedings under the Bankruptcy Act, bankruptcy be proceeded with, the cost and expenses of administration of the ensuing bankruptcy are to have priority over the cost and expenses of the superseded proceedings. Therefore, in this example, Reading's claim would still have first priority status because it was an expense of the arrangement and the third party's claim would also have first priority status because it was an expense of the bankruptcy proceedings. But by the above clause in section 64a(1), the two first priority claims will not share

28. Reading Co. v. Brown, 391 U.S. 471, 479 (1968).
29. Reading Co. v. Brown, *supra*, at 482.
30. Reading Co. v. Brown, 391 U.S. 471, 479 (1968).
31. 141 U.S. 327, 332 (1891).
32. 11 U.S.C. § 104a(1) (1964).

pro rata; the third party's claim must be paid fully before Reading's claim is paid. Thus, if the third party's claim is large enough to exhaust the assets, all other claims would be valueless. Another interesting problem would be presented by a claim for injuries resulting from negligence of the trustee in straight bankruptcy after most or all of the assets had been distributed to the creditors as dividends, but before the closing of the estate. Considering the above it seems that the holding and reasoning in the *Reading* case puts an unnecessary and unwarranted emphasis on the time the tort is committed because the "beneficiary" of the last negligent tort committed may get all of the assets.

A direct and immediate result of this case will probably be to discourage Chapter XI arrangements and force businesses to seek straight bankruptcy instead. A business that might have been rehabilitated into a successful and solvent operation, able to pay all of its creditors fully, may now seek straight bankruptcy, and pay the general creditors a percentage of their debt at best. Section 337 (2)[33] of the Bankruptcy Act requires that the debtor deposit money sufficient to pay all debts that have priority, or that the creditors holding claims which have priority waive the deposit, before an arrangement can proceed. Section 362 (1)[34] requires that a majority, in number and amount, of all the creditors, priority or general, accept the arrangement in writing before an arrangement can proceed. An arrangement will sometimes extend over a long period, and negligent torts are more probable in arrangements than in straight bankrupties because the business is being actively conducted.[35] Therefore, it is doubtful in the future that priority creditors will waive the requirement of a deposit[36] and general creditors may not be agreeable to an arrangement.

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33. 11 U.S.C. § 737(2) (1964).

34. Bankruptcy Act § 361, 11 U.S.C. § 761 (1964), provides in part:

> An arrangement which at the meeting of creditors . . . has been accepted in writing by all creditors affected thereby, whether or not their claims have been proved, shall be confirmed by the court when the debtor shall have made the deposit required under this chapter and under the arrangement . . .

Bankruptcy Act § 362, 11 U.S.C. § 762 (1964), provides in part:

> If an arrangement has not been so accepted, an application for the confirmation of the arrangement may be filed with the court . . . but not before—(1) it has been accepted in writing by a majority in number of all creditors or, if the creditors are divided into classes, by a majority in number of all creditors of each class, affected by the arrangement, whose claims have been proved and allowed before the conclusion of the meeting, which number shall represent a majority in amount of such claims generally or of each class of claims, as the case may be; and (2) the debtor has made the deposit required under this chapter and under the arrangement.

35. Business may be conducted for a limited period in a straight bankruptcy proceeding. Bankruptcy Act § 2a (5), 11 U.S.C. § 11a(5) (1964).

36. "Upon confirmation of an arrangement— . . . (2) the money deposited for priority debts and for the cost and expenses shall be disbursed to the persons entitled thereto; . . ." Bankruptcy Act § 367, 11 U.S.C. § 767 (1964). It is doubtful if a creditor with a priority claim will risk the possibility of not recovering when he can require a deposit, and thus insure his full recovery, before the debtor can proceed with the arrangement.

Many of the problems created by the *Reading* decision could be resolved by an amendment to section 63a of the Bankruptcy Act.[37] The proposed amendment would allow unsatisfied claims for negligent torts of a receiver or trustee, operating within the scope of his authority under the Bankruptcy Act, to be provable and allowable as a general claim which would be paid pro rata with the claims of the general creditors. Claims created by this proposed amendment would be, by section 63a, "debts of the bankrupt"[38] for which the receiver or trustee should not be personally liable.[39] The debt would be dischargeable if the bankrupt received a discharge. The amount of the claim created by the proposed amendment would be limited to the amount of the loss unsatisfied by any insurance that the trustee, receiver, or bankrupt had to cover such liability.

This amendment would be necessary because under the present wording of the Bankruptcy Act, and the holding in the *Reading* decision, negligent tort claims are not provable and can not be allowed to share in the bankrupt's assets with the general creditors. The effect of such an amendment would be to limit the amount of the bankrupt's assets withheld from the general creditors (since the amount withheld would not include tort claims), and thus increase the possibility of the priority claims recovering fully. At the same time the proposed amendment would allow the tort claimant to recover something for his injuries without making the claims of the general creditors subject to being rendered completely worthless by a fortuitous event. The amendment would promote the purpose for having priority claims by increasing the possibility that priority claims will be paid fully. The two primary purposes of the Bankruptcy Act, an orderly, equitable, and pro rata distribution of the bankrupt's assets to his creditors and relieving the bankrupt of his burden of debts, would also be furthered by the proposed amendment. This approach of amending the Bankruptcy Act after a Supreme Court decision

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37. 11 U.S.C. § 103a (1964). The following is offered as an example of how the amended portion of section 63a might read. The words added are shown in brackets. "a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . . [(10) the right to recover damages resulting from a negligent act of a receiver or trustee acting within the scope of authority of a receiver or trustee under this act. The claim shall be limited in amount to the difference between the amount of the loss and the amount realized by the claimant from any insurance that the receiver, trustee or bankrupt had to insure against the liability for such loss.]

38. 11 U.S.C. § 103a (1964). "a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . ."

39. See n. 24 *supra*.. The Supreme Court said by dictum in McNulto v. Lochridge, 141 U.S. 327, 332 (1891): "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

is not without precedent and appears to be the most effective solution to the problems created by the *Reading* decision.[40]

L. THOMAS ELLISTON

AUTOMOBILE JOINT ENTERPRISE LIABILITY OF PASSENGERS AND IMMUNITY OF INFANTS

Manley v. Horton[1]

Bell v. Green[2]

Nearly all states, including Missouri, have recognized that under certain circumstances, the negligence of an automobile driver may be imputed to his passengers. Imputed negligence is an historical outgrowth of the doctrine of identification, by which it was said that the occupant of a vehicle was so identified with the vehicle and its driver that the driver was not liable to the occupant for injury caused by negligent operation of the vehicle.[3] This doctrine is now dead in the United States, and the joint enterprise theory has developed in its place as a mode of imputing an automobile driver's negligence to his passenger.[4] Joint enterprise[5] is based on agency principles[6] and requires that the driver and passenger have a mutual interest in the trip and have a mutual right of control of the vehicle.[7]

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40. To withdraw the possibility that a creditor might succsessfully claim first priority status for a claim created by the proposed amendment, section 64a(1) could be amended to specifically exclude such claims. An example of this approach is the amendment of section 64a to allow first priority claims for accountants' and appraisers' fees that the Supreme Court disallowed in Guerin v. Weil, Gotshal & Manges, 205 F.2d 302 (2d Cir. 1953). In this case the claim of petitioners, in an involnntary bankruptcy proceeding, for accountants' and appraisers' fees incurred in a contest to secure the adjudication of bankruptcy were disallowed as a first priority. The Court said that since the Bankruptcy Act specifically enumerates allowances to be made, any omissions from the Act should be construed as exclusions and suggested congressional action. The Bankruptcy Act § 64a(1), 11 U.S.C. § 104a(1) (1964), was amended to include these fees. 1962 U.S. CODE CONG. & AD. NEWS 2603, 2607-2608 (1962).

1. 414 S.W.2d 254 (Mo. 1967).
2. 423 S.W.2d 724 (Mo. En Banc 1968).
3. Thorogood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (1849).
4. T. SHEARMAN & A. REDFIELD, LAW OF NEGLIGENCE § 66 (6th ed. 1913).
5. The courts frequently use the term joint enterprise interchangeably with the term joint venture or joint adventure. These terms are not completely synonymous because a joint adventure requires a business relationship while joint enterprise does not. *See* Annot., 63 A.L.R. 910 (1929); 48 C.J.S. *Joint Adventures* § 1 (1936); James, *Vicarious Liability,* 28 TUL. L. REV. 161, 211 (1954).
6. AM. JUR., *Negligence* § 238 (1941); W. PROSSER, TORTS § 71 (3d ed. 1964); Hodge v. Feiner, 338 Mo. 268, 90 S.W.2d 90 (1935).
7. 38 AM. JUR., *Negligence* § 238 (1941); 5 AM. JUR., *Automobiles* § 501 (1936); James, *supra* note 5, at 211; Weintraub, *The Joint Enterprise Doctrine in Automobile Law,* 16 CORNELL L. Q. 320, 325 (1930).

The identification doctrine provided an automatic bar to recovery in a suit by a passenger against his driver or a third party. By rejecting identification in favor of agency principles, the courts have relieved the passenger of the burden of an automatic bar to recovery. Another of the prime considerations in rejecting identification was a fear that it would be extended beyond imputing contributory negligence and would be used to hold the passengers liable to third parties.[8] However, two recent Missouri cases indicate that the joint enterprise theory has not restricted, but has actually expanded the purposes for which negligence may be imputed while at the same time presenting unique problems in cases involving minor passengers. *Manley v. Horton*[9] held that the joint enterprise theory is not restricted to imputing contributory negligence, but may also be used to impute liability to a passenger. The case was followed closely by *Bell v. Green*,[10] holding that an infant passenger may not be found liable on a joint enterprise theory. This note will attempt to analyze the basis and effect of these two cases on the joint enterprise liability of automobile passengers.

In *Manley v. Horton*, the plaintiff was injured in a collision involving an automobile driven by one Horton and owned by the defendant, who was a passenger at the time of the collision. The plaintiff instituted the suit against the defendant on a joint enterprise theory. At the trial a directed verdict for the defendant was granted. On appeal, the Missouri Supreme Court remanded the case for a new trial, holding that the existence of a joint enterprise was a question for the jury and that the defendant could be found liable on a joint enterprise theory. The court stated:

> While this doctrine is frequently used to show contributory negligence on the part of the non-operator, it is seldom used to create liability on his part to a third person. However, we see no legal reason why it should not operate both ways.[11]

From a layman's point of view, it may not seem equitable for the passenger on a pleasure venture to be held liable for the driver's negligence. Such liability would appear to be a contingency that the layman would not anticipate. This latter point is emphasized by the fact that non-business passengers are not likely to be insured against vicarious liability unless they are the owner of the vehicle.[12] However, a logical application of agency principles to such cases demands vicarious liability to third persons as well as imputed contributory negligence where the passenger sues the driver. It is unnecessary to cite authority for the rule that a

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8. Weintraub, *supra* note 7, at 323. For the view that the identification doctrine of Thorogood was applied only to bar recovery and not to create liability, see Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193 (1921).

9. 414 S.W.2d 254 (Mo. 1967).

10. 423 S.W.2d 724 (Mo. En Banc 1968).

11. 414 S.W.2d 254, 261 (Mo. 1967). *See also* W. PROSSER, *Torts* § 65 (2d ed. 1955).

12. Standard automobile liability policies protect against liability arising when the owner is driving or when a third party is driving with the owner's permission.

principal may be found liable for the torts of his agent if the principal has the right to control the agent's physical acts. Since a joint enterprise is founded on an agency relationship between the driver and passenger, it is not surprising that the passenger (principal) may be held responsible for the driver's (agent) negligence. Therefore, the Missouri Supreme Court's position in *Manley v. Horton* is manifestly sound in legal principle, and it is also in accord with the overwhelming weight of authority.[13]

Prima facie, it may appear that the joint enterprise theory greatly extends the purposes for which negligence may be imputed and places a great burden on automobile passengers. However, it should be emphasized that automobile passengers will not be exposed indiscriminately to vicarious liability. A joint enterprise exists only when the requisite elements of joint purpose and joint right of control are present.[14] Moreover, one writer has concluded that the courts are more reluctant to find an agency relationship when the passenger is a defendant as opposed to cases in which he is a plaintiff.[15]

A second important Missouri case dealing with joint enterprise is *Bell v. Green*.[16] There plaintiff was injured while riding as a passenger in an automobile which was driven by one Becker and owned by the minor defendant, who was also a passenger. After the trial, the defendant's motion for judgment notwithstanding the verdict was sustained and the plaintiff appealed on the theory that Becker was driving as the instrument of the defendant. The Missouri Supreme Court sustained the lower court, finding that there was no evidence that the defendant actually participated in the negligence of the driver and holding that a minor cannot be found vicariously negligent on a joint enterprise or joint venture theory. The rationale of the latter holding was that the theory of joint enterprise is founded on an express or implied contract of agency or partnership; and since the agency contracts of minors are void, a minor cannot become a member of a joint enterprise.

To evaluate the *Bell* decision, it is necessary to examine the basic precepts on which negligence is imputed. Not all agency relationships will warrant imputing the agent's negligence to his principal. Negligence is imputed on the theory of respondeat superior which may be used only if the principal has the right to control the agent's physical conduct.[17] When the principal has this right of control, the

13. Lucey v. John Hope and Sons Engraving and Mfg. Co., 45 R.I. 103, 120 Atl. 62 (1923); Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924); Howard v. Zimmerman, 120 Kan. 77, 242 Pac. 131 (1926).

14. RESTATEMENT, TORTS § 485 (1936):

> [A] plaintiff is barred from recovery by the negligent act . . . of a third person if, but only if, the relation between them is such that the plaintiff would be liable as defendant for harm caused to others by . . . the third person.

15. Morris, *Motor Vehicles—Imputed Negligence—The Doctrine of Principal and Agent as Applied to Driver-Passenger Relationship—Liability and Defense Contrasted,* 40 WIS. L. REV. 135 (1940).

16. 423 S.W.2d 724 (Mo. En Banc 1968).

17. *See* Brunk v. Hamilton-Brown Shoe Co., 334 Mo. 517, 66 S.W.2d 903 (1933); Snowwhite v. Metropolitan Life Ins. Co., 344 Mo. 705, 127 S.W.2d 718 (1939).

relationship is deemed a master-servant relationship which is a form of agency.[18] Thus, even though an agent has authority to bind his principal in contractual matters, that agent's negligent acts will not be imputed to his principal unless those acts were subject to control by the principal. The primary question in imputed negligence cases is not whether there is an agency relationship, but whether there is a relationship in which one party (master) has the right to control another party's (servant) physical conduct.

The result in the *Bell* case turns on the question of what persons have the capacity to appoint an agent, *i.e.*, what persons have the capacity to acquire the right to control another person's (servant) physical conduct? The thrust of the *Bell* decision is that an agency and, therefore, the right to control an agent's physical conduct, can be derived only from *contract* and that a minor has no capacity to acquire a *right of control* because his contracts of agency are void. The result of this reasoning is the conclusion that a minor is not subject to respondeat superior liability.

The result reached by the *Bell* court is wrong because the court's analysis of respondeat superior is based on the erroneous assumption that agencies (rights of control) are based on contract. The court did not analyze the nature of an agency relationship but simply relied on the case of *Hodge v. Feiner*,[19] which dogmatically pronounced that "[t]he relationship of master and servant or principal and agent exists only in contract . . ."[20]

An agency is really a consensual relationship, and not a contractual relationship.[21] The rule is best stated by the *Restatement (Second) of Agency*:

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18. RESTATEMENT (SECOND) OF AGENCY § 2, comment *a* (1957); Fruco Const. Co. v. McClelland, 192 F.2d 241, *cert. denied* 342 U.S. 945 (1952); Maltz v. Jackoway-Katz Cap Co., 336 Mo. 1000, 82 S.W.2d 909 (1935).

19. 338 Mo. 268, 90 S.W.2d 90 (1935).

20. 338 Mo. 268, 271, 90 S.W.2d 90, 91 (1935).

21. RESTATEMENT (SECOND) OF AGENCY § 20, comment *b* (1957); Seavey, *Rationale of Agency*, 29 YALE L. J. 859, 863 (1920); 2 J. WILLISTON, CONTRACTS, § 274 (3d ed. 1959); Lohmuller Bldg. Co. v. Gamble, 160 Md. 534, 154 Atl. 41 (1931); Brothers v. Berg, 214 Wis. 661, 254 N.W. 384 (1934); Lee v. Peoples Cooperative Sales Agency, 201 Minn. 266, 276 N.W. 214 (1937); Columbia University Club v. Higgins, 23 F. Supp. 572 (1938); Shimick v. Stearns, 91 N.E.2d 292 (1949); *See also* Utlaut v. Glick Real Estate Co., 246 S.W.2d 760, 763 (Mo. 1952), where the court states:

> The relation of principal and agent is created by manifestation of consent of one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act . . . . it is not essential that there be a contract between the principal and the agent.

Leidy v. Taliaferro, 260 S.W.2d 504, 507 (Mo. 1953), stating in dictum that compensation is not essential to the creation or existence of the [agency] relationship.

In Hawkings v. Laughlin, 236 S.W.2d 375 (K.C. Ct. App. 1951), defendant hospital contacted special nurse to care for plaintiff while plaintiff was in hospital. Plaintiff compensated the nurse directly for her services. Plaintiff sued hospital for negligence of the nurse. Held, hospital liable as nurse's principal. *See also* E. B. Jones Motor Co. v. Pullen, 298 S.W.2d 448, 452 (St. L. Ct. App. 1957), stating:

> There is no particular mode or method which must be adhered to in order to create or establish an agency. Regardless of the terms used by the

> Agency is not necessarily the result of a contract; hence it is not necessary for the appointment of an agent that the principal should have capacity to contract. Agency is, however, a consensual relation, and therefore the principal must have capacity to give a legally operative consent. Aside from statute, there are no special rules which limit the capacity of persons to become principals. Thus, married women and insane persons can authorize agents to accomplish transactions if, but only if, they have capacity to become parties to such transactions. . . .[22]

There is a great deal of authority in other states for the *Restatement* position,[23] and Missouri courts have in fact held that a contract is not necessary to create an agency.[24]

The *Restatement* points out that the real question is not whether the principal has the capacity to contract, but whether the principal has the capacity to consent to having another party act on his behalf and under his control.[25] Thus, the inquiry should be, is there any policy reason for holding that a minor cannot consent to such a relationship? The writer has discovered no written expression of policy reasons for depriving a minor of the capacity to enter a consensual (agency) relationship. There is no apparent social harm in allowing a minor to delegate the performance of acts which he is legally capable of performing himself. However, there are policy reasons which dictate against allowing a minor to delegate the performance of specific acts where the minor is legally incapable of personally performing those acts. The most obvious example is the act of making a contract. The same policies which dictate that a minor cannot make a non-voidable contract also justify a rule that minor cannot authorize an agent to make a contract on the minor's behalf. However, allowing a minor to appoint an agent will not frustrate the policy behind minors' contractual incapacity. It is basic agency law that a principal can only authorize his agent to do those acts which the principal can legally perform himself.[26] Thus, the minor's normal incapacities will not be changed by allowing him to enter an agency relationship and there would appear to be no justification for withholding the capacity to appoint an agent.

In light of the foregoing conclusions the proper analysis of the *Bell* case should be as follows. A minor is legally capable of operating a motor vehicle and is legally responsible for the manner in which he operates that vehicle. Therefore,

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> parties, or by what name the transaction is designated, if the facts fairly disclose that one party is acting for . . . another, by the latter's authority, the relationship of agency exists.

There are, however, many Missouri cases which state the view that an agency exists only in contract. *See, e.g.*, State v. Cox, 315 Mo. 619, 286 S.W. 368 (1926); State v. Cochran, 336 Mo. 649, 80 S.W.2d 182 (1935); Brown v. Anthony Mfg. Co., 311 S.W.2d 23 (Mo. 1958); Lajoie v. Rossi, 225 Mo. App. 651, 37 S.W.2d 684 (K.C. Ct. App. 1931); Hodge v. Feiner, 338 Mo. 268, 90 S.W.2d 90 (1935).

22. RESTATEMENT (SECOND) OF AGENCY § 20, comment *b* at 91 (1957).
23. *See* note 6, *supra.*
24. *See* note 6, *supra.*
25. RESTATEMENT (SECOND) OF AGENCY § 20, comment *b* at 91 (1957).
26. RESTATEMENT (SECOND) OF AGENCY § 20 (1957).

a minor is capable of appointing an agent to drive a vehicle and can attain the right to control the manner in which the agent operates the vehicle. Therefore, a minor can become a member of a joint enterprise and may be subject to respondeat superior liability for the negligence of his co-enterpriser (agent).[27]

Although the *Bell* decision fails to take cognizance of the rule that an agency is not a contractual relationship, the court should not be unduly criticized. Where infant principals are involved, many cases in the United States have tied the appointment of an agent or servant to contract.[28] In these cases, the vicarious liability of the minor principal depended on his capacity to make a contract of agency. Therefore, in Missouri and many other states, the attorney must continue to analyze the vicarious liability of minors in terms of contract theory notwithstanding the discussion *supra*. The remainder of this note will evaluate the *Bell* decision in terms of what might be called a contract theory of agency.

The *Bell* case stands for the proposition that the contractual immunity of minors protects them from liability for torts committed by the minor's purported agents. Do the policy reasons for minors' contractual immunity warrant immunity from torts committed by ostensible agents who are in fact, though not by contract, subject to the control of a minor? If a minor is liable for his own torts should he not be liable for the torts of his ostensible agents? The policy reasons for minors' contractual immunity do not warrant thwarting the rule that minors may be held liable in tort actions. The policy behind contract immunity is that minors should be protected from unfavorable contracts resulting from their own lack of business acumen.[29] This policy clearly applies to deny a contract recovery to those parties who have entered into a contract with the minor and stand to gain from the minor's business inexperience. However, there is little reason why a minor's lack of business expertise should warrant immunity from torts which the minor's agent commits against third parties who are strangers to the minor's contracts. The third parties do not stand in a position of advantage with respect to the minor, and presumably the tortious act of the agent would not have been committed but for the minor having appointed an agent to act on his behalf.

While Missouri holds that a minor's agency contracts are absolutely void,

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27. For respondeat superior liability of minors, *see* Carroll v. Harrison, 49 F. Supp. 283, *aff'd* 139 F.2d 427 (4th Cir. 1943), on ground that minor was negligent; Woodson v. Hare, 244 Ala. 301, 13 So.2d 172 (1943). *See also* Feaglas v. Sullivan, 32 Pa.D.&C. 47 (1938), and Scott v. Schisler, 107 N.J.L. 391, 153 A. 395 (1931), agency is based on contract, but minor's agency contracts are not void, only voidable. *See also* Wilson v. Moudy, 22 Tenn. App. 356, 123 S.W.2d 828 (1938), minor cannot have an agent, but minor held liable for automobile driver's negligence because minor was present in automobile and had *right* to control driver's conduct.

28. Palmer v. Miller, 380 Ill. 256, 43 N.E.2d 973 (1942); Burns v. Smith, 29 Ind. App. 181, 64 N.E. 94 (1902); Payette v. Fleischman, 329 Mich. 160, 45 N.W.2d 16 (1950); Fernandez v. Lewis, 92 S.W.2d 305 (Tex. Civ. App. 1936); Covault v. Nevitt, 157 Wis. 113, 146 N.W. 1115 (1914).

29. James, *Vicarious Liability*, 28 TUL. L. REV. 161, 208 (1954); Byers v. Lemay Bank and Trust Co., 365 Mo. 341, 282 S.W.2d 512 (1955).

in most jurisdictions such contracts are only voidable.[30] The majority rule has merit in that it protects minors from unfavorable contracts, while not destroying their capacity to make an agency contract. However, there is a conflict of opinion as to the effect of the majority rule on the respondeat superior liability of minors. One court has concluded that even if the agency contract is not void, but only voidable, a minor principal may not be held liable on a respondeat superior theory.[31] There are other cases in which it was held that a minor may be liable under respondeat superior if the agent's tortious act is committed before the agency contract is disavowed.[32] The latter cases are inconsistent with the rule that a minor's disaffirmance operates to void his contracts *ab initio*.[33] A strict application of the *ab initio* rule would require that upon disaffirmance, the minor is relieved of any obligation arising from his agency contract. However, the lack of policy reasons for the minor's tort immunity, justifies excepting torts from the *ab initio* rule.

Since it appears that there is no valid policy justification for immunizing minors from liability for the torts of their agents, it would seem proper to inquire whether prior Missouri case law demanded the holding in *Bell v. Green*. In *Bell*, the

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30. In most jurisdictions, a minor's general contracts are not void, but voidable, 43 C.J.S. *Infants* § 71 (1945), and minors' agency contracts are not void, but voidable, 43 C.J.S. *Infants* § 23 (1945). Missouri adopts the majority rule *supra* for general contracts. Windisch v. Farrow, 159 S.W.2d 392 (St. L. Mo. App. 1942); Mutual Bank & Trust Co. v. Stout, 231 S.W.2d 274 (St. L. Mo. App. 1950); Merrick v. Stephens, 337 S.W.2d 713 (Spr. Mo. App. 1960). Minor's agency contracts are absolutely void in Missouri, however. Curtis v. Alexander, 257 S.W. 432 (Mo. 1923); State *ex rel.* Dyer v. Union Elec. Co., 309 S.W.2d 649 (St. L. Mo. App. 1958); Hodge v. Feiner, 78 S.W.2d 478 (St. L. Mo. App.), *aff'd*, 338 Mo. 268, 90 S.W.2d 90 (1935); Poston v. Williams, 99 Mo. App. 513, 73 S.W. 1099 (K.C. Ct. App. 1903). *See also* 43 C.J.S. *Infants* § 23 (1945).

31. Covault v. Nevitt, 157 Wis. 113, 146 N.W. 115 (1914), disaffirmance operates to void the agency *ab initio*.

32. Scott v. Schisler, 107 N.J.L. 397, 153 A. 395 (1931); Feaglas v. Sullivan, 32 Pa.D.&C. 47 (1938). *See also* Woodson v. Hare, 244 Ala. 301, 13 So.2d 172 (1943), where a minor was held liable on the theory that because he appointed another party to drive, that person was the minor's "alter ego" or "agent in law." *See also* Wilson v. Moudy, 22 Tenn. App. 356, 376, 123 S.W.2d 828, 840 (1938), where the court stated:

> [S]ince the creation of an agency involves a contract and a minor cannot lawfully appoint an agent, it is the general rule that a minor may not be made liable for the tortious acts of one to whom he has undertaken to delegate authority to act as his agent; but the rule last stated does not apply where the driver of an automobile was acting in the immediate presence and subject to the direction of the minor who had authority to control his operation of the car . . . . The *right to control* is the test. (*emphasis the courts*)

Quaere, is this distinction logical? The court did not find that the minor actually participated in the driver's negligence, but only that he had a *right* to control the driver. If the minor were not in the car, would he have any less *right* to dictate how the driver should operate the vehicle?

33. Sassenrath v. Lewis Motor Co., 246 S.W.2d 520 (St. L. Mo. App. 1942); Windisch v. Farrow, 159 S.W.2d 392 (St. L. Mo. App. 1942); Phillips v. Savings Trust Co. of St. Louis, 231 Mo. App. 1178, 85 S.W.2d 923 (St. L. Ct. App. 1935).

court relied on *Hodge v. Feiner*[34] to rule that an infant's agency contracts are void and that, as a result, an infant cannot become a member of a joint enterprise or joint venture.[35] The court concluded that the state of the law in Missouri is so well settled that "we do not choose to declare . . . that a minor may appoint an agent for one purpose but not for another."[36] A review of the Missouri cases, however, reveals that it has twice been held that minors may, upon reaching majority, ratify contracts made on their behalf during their minority.[37] Since ratification imports an agency[38] and operates retroactively,[39] ratification of those contracts recognizes the existence of an agency relationship between the minor and the party who originally made the contract on the minor's behalf. If these cases had applied the rule of the *Bell* case the contracts could not have been ratified because the

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34. 338 Mo. 268, 90 S.W.2d 90 (1935).

35. The court also concluded that a Springfield Court of Appeals case, McKerall v. St. Louis-San Francisco Ry. Co., 257 S.W. 166 (Spr. Mo. App. 1923), was not a joint enterprise case but was decided on the basis of active negligence by the infant passenger. Analysis of the *Feiner* and *McKerall* cases reveals that the *Feiner* court held that a non-passenger infant who had entrusted the automobile to another could not be held on a respondeat superior theory because he could not have an agent. Yet the *Feiner* court distinguished and did not overrule *McKerall* in which the driver's negligence was imputed to a minor who was present in the vehicle. In discussing *McKerall,* the *Feiner* court stated:

> In many . . . imputed negligence cases . . . the ultimate conclusion . . . is that the party to whom negligence is imputed actually participated in the act of negligence or was in charge of the car . . . , and therefore had the right or authority to direct the driver of the vehicle in the manner of its operation. . . . The Springfield Court of Appeals . . . held that . . . , the minor . . . actually participated in the act of negligence, that is, the car was held to be under her direction, and she permitted the operator . . . to drive it upon a railroad track . . .

338 Mo. 268, 273-74, 90 S.W.2d 90, 92 (1935).

The *Bell* court concluded that the above statement, "the deceased minor . . . actively participated in the negligence." However, the right to control the operation of the vehicle would seem to be the real basis of the *McKerall* decision. The report of the case reveals no evidence of lack of due care or actual control of the vehicle by the passenger; in fact, all occupants of the vehicle were killed in the accident. The case actually held improper a jury instruction to the effect that the passenger would be responsible only if she actively participated in the driver's negligence and stated that because the car was under her direction the driver's negligence was hers in the eyes of the law.

Thus, it seems that the real basis of the *McKerall* decision was joint enterprise. If, however, as the *Bell* court states, *McKerall* was not based on joint enterprise, it would appear that the case must have been based on the proposition that a passenger with the right to control is actively negligent as a matter of law. This proposition is totally without precedent, and dictum in the *Bell* decision indicates that the party alleging active negligence must provide evidence of lack of due care. Thus, it would seem that *McKerall* has in effect been overruled.

36. Bell v. Green, 423 S.W.2d 724, 731 (Mo. En Banc 1968).

37. Ward v. Steamboat Little Red, 8 Mo. 358 (1844); Anderson v. Middle States Utilities Co., 231 Mo. App. 129, 98 S.W.2d 163 (K.C. Ct. App. 1936).

38. Wade v. Goldsberry, 17 Mo. 270 (1852); Bank of Commerce v. Bernero, 17 Mo. App. 313 (St. L. Ct. App. 1885).

39. Davison v. Farr, 273 S.W.2d 500 (Spr. Mo. App. 1954); Ireland v. Shukert, 238 Mo. App. 78, 177 S.W.2d 10 (K.C. Ct. App. 1944).

agency relationship and, consequently, the contracts made thereunder, would have been absolutely void.[40] While these two cases would appear to be overruled by the language of *Bell,* they could have been used to reach a different result in that case.

It is also significant to note that there is a series of Missouri decisions holding that a minor's *partnership* contracts are voidable rather than void.[41] Of course, a partner is technically the agent of the partnership and not the agent of his partners as individuals.[42] However, where the contractual (agency) relationships of minors are involved, there would seem to be no compelling reason for distinguishing between the vicarious liability arising from a partnership and that arising from a direct agency. The difference is one of form and not of substance because in either relationship there are other parties acting to further the interests of the minor. Thus, it would appear that in *Bell v. Green* the supreme court could have found authority to recognize the validity of infant's agency contracts, despite the contrary rule announced in *Hodge v. Feiner.*[43] In addition, the supreme court decided in *Hill v. Bell*[44] that a minor's partnership interest is subject to partnership debts and that such liability may not be avoided by subsequent disaffirmance. This case would have added weight to the argument that once an agent's torts are imputed to a minor principal, the minor may not defeat the resulting liability by subsequent disaffirmance.[45]

In conclusion, *Manley v. Horton* and *Bell v. Green,* illustrate two distinct aspects of the joint enterprise theory as applied in Missouri. *Manley* merely points out the sound proposition that since joint enterprise is based on the existence of an agency relationship between the driver and passenger, it is proper to impute negligence to the passenger for purposes of vicarious liability as well as to bar

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40. A void contract cannot be ratified. McFarland v. Heim, 127 Mo. 327, 29 S.W. 1030 (1895); Harry M. Fine Realty Co. v. Stiers, 326 S.W.2d 392 (St. L. Mo. App. 1959).

41. Kerr v. Bell, 44 Mo. 120 (1869); Hill v. Bell, 111 Mo. 35, 19 S.W. 959 (1892); Huffman v. Bates, 348 S.W.2d 363 (Spr. Mo. App. 1961). The *Bell* decision casts doubt on the validity of these cases. The decision states that an "infant cannot . . . be a partner." 423 S.W.2d 724, 731 (Mo. 1968). However, since the *Bell* case did not deal with a formal business partnership, it is distinguishable from the cases cited above.

42. § 358.090, RSMo (1959).

43. 338 Mo. 268, 90 S.W.2d 90 (1935).

44. 111 Mo. 35, 19 S.W. 959 (1892).

45. Although this case deals with contract liability and not tort liability, it shows that vicarious liability of minors is not a totally foreign concept in Missouri. The case also adds weight to the argument that once an agent's torts are imputed to a minor principal, the minor may not defeat the resulting liability by subsequent disaffirmance. In fact, an analogy can be drawn between the creditors of a partnership and the tort victims of a minor's agent. A creditor expects that his rights will be secured by the assets of the partnership, regardless of who the partners are. By analogy, the tort victim should be able to expect indemnity from the tortfeasor's master, no matter who that master might be. In fact, there is more reason to allow the tort victim to recover than to allow the creditor to recover. A creditor consciously elects to enter contracts with a partnership and can discover the minority of any partner before entering the contract. By contrast, a tort victim does not choose to be a victim and obviously cannot take precautions to assure that the tortfeasor's master will have attained majority.

recovery by such passengers. The passenger will not, however, be subjected to indiscriminate liability because a joint enterprise requires a passenger-driver relationship which is in fact an agency relationship.

Bell v. Green presents a more disturbing aspect of the joint enterprise theory. It establishes the rule that Missouri will not recognize the agency relationships of minors and, therefore, will not impute negligence to minors on a joint enterprise theory. Treating the agency relationship as contractual, the court has immunized minors from liability for the acts of their agents by rigidly applying a doctrine which was intended only to protect minors from unfair business transactions. The result is that the rights of innocent third parties are necessarily abridged and minors are afforded an immunity which has no valid policy justification. The supreme court merely concluded that "this is a matter of public policy which should be regulated by the legislature."[46] The implications of this decision go far beyond the confines of automobile joint enterprise cases. For instance, a minor apparently may hire agents to conduct a business enterprise and remain immune from torts which his agents commit against the public. While the problem could have been contained judicially, the potential injustices of such immunity may now require intervention by the Legislature.

LARRY G. SCHULZ

THE "LOCALITY RULE" IN MEDICAL MALPRACTICE CASES: NECESSARY DEMISE OF AN ARCHAIC POSTULATE

Brune v. Belinkoff[1]

During the delivery of the plaintiff's baby, the defendant anesthesiologist[2] injected eight milligrams of the anesthetic pontocaine into the plaintiff's spine. While attempting to get out of bed after the operation the plaintiff fell, and later complained that her left leg was numb and weak. The plaintiff introduced ample evidence indicating that her condition resulted from an excessive dose of the pontocaine.[3] The defendant, however, elicited expert testimony that in the defendant's community, New Bedford, Massachusetts, it was common practice to administer eight milligrams of pontocaine during a normal delivery. The plaintiff requested

46. Bell v. Green, 423 S.W.2d 724, 731 (Mo. En Banc 1968).

1. 235 N.E.2d 793 (1968). (The case was not available in the Massachusetts Reporter when this note went to print.)

2. The defendant practiced anethesiology, one of the recognized medical specialities.

3. The plaintiff's medical evidence consisted of the testimony of eight physicians from Boston and New York, each stating that good medical practice required a pontocaine dosage of five milligrams or less. The defendant sought to overcome this testimony by asserting that the difference between New Bedford custom and Boston-New York custom was attributable to differences in obstetrical technique.

that the court instruct the jury that "as a specialist, the defendant owed the plaintiff the duty to have and use the care and skill commonly possessed and used by similar specialist[s] in like circumstances."[4] The trial court refused to give this instruction and instead apprised the jury that the defendant need only exercise that degree of care and skill ordinarily exercised by others of his profession practicing in the community of New Bedford and its surrounding areas.[5] This instruction embodied the so-called "locality rule" established in Massachusetts by the case of *Small v. Howard*[6] in 1880. Plaintiff excepted to giving of this instruction, and, after judgment for the defendant, appealed.

The question before the Massachusetts Supreme Judicial Court was whether the locality of the defendant's practice should be an absolute limiting factor upon his liability for malpractice and, concomitantly, whether the eighty-eight-year-old *Small* decision should be overturned. The court, in answer, overruled *Small v. Howard,* declaring:

> The proper standard is whether the physician, if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession. In applying this standard it is permissible to consider the medical resources available to the physician as one circumstance in determining the skill and care required.
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> . . . .
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> One holding himself out as a specialist should be held to the standard of care and skill of the average member of the profession practicing the speciality, taking into account the advances in the profession.[7]

The court reasoned that the medical conditions existing when the locality rule was formulated no longer obtained, and, thus the rule was no longer applicable. The locality rule, said the court, was originally fabricated because a physician in a smal or rural community had little opportunity to keep abreast of advances in the profession and also lacked the most modern facilities for treating his patients. These conditions, the court noted, no longer exist because transportation, com-

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4. Brune v. Belinkoff, 235 N.E.2d 793, 795 (1968).

5. The complete instruction read:

> The defendant must measure up to the standard of professional care and skill ordinarily possessed by others in his profession in the community, which is New Bedford, and its environs, of course, where he practices, having regard to the current state of advance of the profession. If, in a given case, it was determined by a jury that the ability and skill of the physician in New Bedford were fifty percent inferior to that which existed in Boston, a defendant in New Bedford would be required to measure up to the standard of skill and competence and ability that is ordinarily found by physicians in New Bedford.

Id. at 795.

6. 128 Mass. 131 (1880).

7. Brune v. Belinkoff, 235 N.E.2d 793, 798. The court found it necessary to point out that specialists should be held to the same standard of care as general practitioners because here the defendant was not a general practitioner but was practicing a medical speciality, anesthesiology. The locality rule first formulated in *Small* involved a general practitioner, but the Massachusetts court had made the same rule applicable to specialists.

munication, and medical education have vastly improved, tending to promote a certain degree of standardization within the profession. The justices were of opinion that rural doctors today have substantial opportunities to keep abreast of advances in the profession and have frequent access to modern medical equipment. Therefore, they decided, a physician's liability for negligence should be based upon "reasonable care under the circumstances," with the locality of the practice being only one of the circumstances. In no case should the locality of the practice set an absolute limit on this liability.[8]

The locality rule was adopted by most American courts[9] in the late nineteenth and early twentieth centuries,[10] generally for the same policy reasons summarized by the Massachusetts court.[11] The rule as thus strictly stated raised problems which soon forced many courts to liberalize it. If the physicians in a given place were persistently careless, application of the strict locality rule imposed a subminimal standard of care, to the expense of injured patients.[12] Also, since a plaintiff had to prove by expert testimony that the defendant failed to exercise proper care,[13] a plaintiff suing the only doctor in a particular locality could not meet the requisite burden of proof. Testimony of physicians who had never practiced in the defendant's locality was inadmissible on the standard of care issue.[14] To meet these problems courts rephrased the rule so as to include "similar localities of practice" in the definition of a physician's negligence.[15]

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8. *Id.* at 796. It is interesting to note that the court in *Brune* stated that on the evidence presened in *Small* the earlier court was correct to rule as it had. In *Small,* the rural physician was called upon to perform surgery that required a high degree of art and skill, possessed at that time only by "eminent surgeons practicing in large cities, and making a specialty of the practice of surgery." *Id.* at 795-96.

One other consideration in *Brune* greatly influenced the court's decision. The court was clearly displeased with the trial judge's instruction that if the local standard of care was fifty-percent lower than that elsewhere the defendant still could only be held to the local standard. "This may well be carrying the rule of *Small v. Howard* to its logical conclusion," the court said, "but it is, we submit, a *reductio ad absurdum* of the rule." *Id.* at 798.

9. There is no English counterpart to the rule.

10. Whitesell v. Hill, 101 Iowa 629, 70 N.W. 750 (1897); Small v. Howard, 128 Mass. 131 (1880); Hathorn v. Richmond, 48 Vt. 557 (1876).

11. Small v. Howard, *supra* note 10.

12. *See* Comment, 35 MINN. L. REV. 186 (1951).

13. The jury is considered incompetent to determine the standard of care except in cases where a layman's knowledge of the subject is sufficient. *See* Pedigo v. Roseberry, 340 Mo. 724, 102 S.W.2d 600 (1937).

14. Thus two distinct types of issues may be encompassed by the locality rule. One concerns the standard of care; the other regards the admissibility of the testimony of proferred experts (and therefore the ability of the plaintiff to sustain his burden of proof). Under the original, strict definition of the rule only the expert testimony of other physicians who practiced in the defendant's locality was admissible on the standard of care issue. Although this result has been avoided by the gradual relaxation or abandonment of the strict locality rule, one state court recently excluded a California doctor's testimony offered to establish the standard of reasonable care in defendant's town of practice, Reno, Nevada. Lockart v. Maclean, 77 Nev. 210, 361 P.2d 670 (1961). An excellent critical discussion of this case can be found in Note, 14 STAN. L. REV. 884 (1962).

15. Bigney v. Fisher, 26 R.I. 402, 59 Atl. 72 (1904); Pelky v. Palmer, 109 Mich. 561, 67 N.W. 561 (1896). The court in *Pelky* stated, "a man with no skill, or inconsiderable skill, should not shelter himself behind the claim that he was

Modern courts have liberalized the rule beyond the mere inclusion of "similar localities." Some courts have extended the geographical area defined within the locality, either by reference to socio-economic and geographical factors,[16] or by reference to purely medical factors, such as the availability of modern facilities.[17] Others have abandoned any form of locality rule altogether in recognition of the changing, improving pattern of modern life and medical practice. These courts decided, as did the Massachusett's court in *Brune,* that the locality of the defendant's practice should be only one of the circumstances to be considered, not an absolute limiting factor on liability.[18] The Washington Supreme Court emasculated the rule, declaring that the standard of care and skill for a physician or surgeon should be established within an area coextensive with all medical facilities readily accessible to the defendant for treating his patients.[19] A few courts have abandoned the rule only as applied to specialists, thus breaking with the majority position which holds specialists and general practitioners to identical standards of care but

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the only practitioner in his neighborhood, and therefore that he was possessed of the ordinary skill required. . . ." *Id.* at 563, 67 N.W. at 561. Under the rule as thus stated a physician became qualified to testify on the standard of care and skill issue after a showing that he was *familiar* with practices in defendant's locality. *See* Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170 (1931).

16. Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3 (1949); Geraty v. Kaufman, 115 Conn. 563, 162 Atl. 33 (1932). Both of these cases involved the question of the admissibility of the testimony of physicians who practiced outside the defendant's community. The Connecticut court said: "Our rule does not restrict the territorial limitation to the confines of the town or city in which the treatment was rendered, and under modern conditions there is perhaps less reason than formerly for such restrictions." *Id.* at 573-74, 162 Alt. at 36.

17. Cavallaro v. Sharp, 84 R.I. 67, 121 A.2d 669 (1956); Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940). The court in *Tvedt* remarked:

> Today with the rapid methods of communication, horizons have been widened, and the duty of a doctor is not fulfilled merely by utilizing the means at hand in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality and community have, in effect, been extended to include those centers readily accessible where appropriate treatment may be had which the local physician, because of limited facilities or training, is unable to give.

Id. at 349, 294 N.W. at 188.

18. Brune v. Belinkoff, 235 N.E.2d 793 (1968); McGulpin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950); Viita v. Fleming, 132 Minn. 128 (Viita v. Dolan), 155 N.W. 1077 (1916). The Iowa court in *McGulpin* said:

> There seems to be sound basis for holding a physician to such reasonable care and skill as is exercised by the ordinary physician of good standing under like circumstances. And the locality in question is merely one circumstance, not an absolute limit upon the skill required.

This applies to specialists as well in the exercise of their special skills. *Id.* at 1131-32, 43 N.W.2d as 128.

19. Pederson v. Dumouchel, 431 P.2d 973 (Wash. 1967). "Negligence cannot be excused on the ground that others in the same locality practice the same kind of negligence. No degree of antiquity can give sanction to usage bad in itself." *Id.* at 977. "The 'locality rule' has no present day vitality. . . ." *Id.* at 978. A later Washington case pointed out that a plaintiff must offer expert medical testimony on a national standard of care and skill if he wishes to rely on such a standard. Versteeg v. Mowery, 435 P.2d 540 (Wash. 1967). The plaintiff in that case failed to do so and her case was dismissed.

requires the specialist to utilize the superlative skills which he in fact possesses.[20] Georgia has abandoned any semblance of a locality rule by judicial construction of a state statute.[21]

These liberalizations indicate the present tendency to abandon the locality formula.[22] In fact, virtually no modern decisions by the American courts go counter to the trend away from the locality rule.[23] Although the majority of jurisdictions have not completely abandoned the rule, increasing numbers have either done so, or have indicated by dicta that they might do so in a proper case.

Missouri courts never really adopted the strict locality rule, but used the expression "similar localities" from the very first. The initial Missouri court decision discussing at some length the duties and liabilities of physicians was handed down in 1905 in *Grainger v. Still.*[24] In dictum the court approved a statement of the required standard of care which appeared in the *American and English Encyclopedia of Law:*

> The standard by which the degree of care, skill and diligence required of physicians and surgeons is to be determined is not the highest order or qualification obtainable, but is the care, skill and diligence which are ordinarily possessed by the average of the members of the profession in

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20. Hundley v. Martinez, 158 S.E.2d 159, 151 W. Vir. 977 (1967); Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953). The court in *Carbone* indicated that locality, even as one of the circumstances, might have little significance in cases involving specialists:

> One who holds himself out as a specialist must employ . . . that special degree of skill normally possessed by the average physician who devotes special study and attention to the particular organ or disease or injury involved, having regard to the present state of scientific knowledge.

Id. at 426, 94 A.2d at 683.

The decisions which give significance to any differences between specialists and general practitioners are few, but the application of any of the modified versions of the locality rule may bring different results where specialties are involved. If a "similar medical locality rule" is applied, the localities considered similar for specialist cases will be larger and more numerous than for cases involving general practitioners. The Stanford Law Review's editorial board conducted a medical survey, concluding therefrom that the practice of medicine in most medical specialties was similar throughout the country, since every specialist regardless of his geographical location is in fact familiar with the standards of care and skill followed by each of the members of the specialty board. Note, 14 STAN. L. REV. 884 (1962).

21. GA. CODE § 84-924 (1933):

> A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which recovery may be had.

The Georgia court stated in Kuttner v. Swanson, 59 Ga. App 818, 820, 2 S.E.2d 230, 232 (1939): "The true rule is that the reasonable degree of care and skill prescribed in the Code is not such as is ordinarily employed by the profession in the locality or community." Rather it is that employed by the profession generally.

Other Georgia cases apparently take the view that no reference should be allowed to locality at all, even as only one of the circumstances.

22. W. PROSSER, TORTS § 32, at 167 (3rd ed. 1964).

23. The one notable exception is Lockhart v. Maclean, 77 Nev. 210, 361 P.2d 670 (1961).

24. 187 Mo. 197, 85 S.W. 1114 (1905).

> good standing in similar localities, regard being also had to the state of medical science at the time.[25]

For some fifty-three years the Missouri Supreme Court, by either decision or dictum, affirmed this basic statement of the law in medical malpractice cases,[26] applying it to specialists as well as to general practitioners.[27] During this period, however, dicta in a few opinions in the courts of appeals indicated some propensity to exclude reference to locality.[28] In *Gore v. Brockman*,[29] for example, the Kansas City Court of Appeals stated that a physician was only required "to use that care, skill, and prudence that an ordinarily capable doctor would use in the same or like situation and condition or circumstances."[30] In one case this formula was declared definitely proper where the physician used a potentially dangerous instrumentality in treating his patient.[31]

Then, in 1958, in the opinion in *Williams v. Chamberlain*,[32] the supreme court by dictum stated that there was really no reason for a "similar locality" rule:

> It may properly be said that a physician is required to use and exercise that degree of care and skill used and exercised by the ordinarily skillful, careful and prudent physician acting under the same or similar circumstances.
>
> . . . .
>
> Actually, there should be do difference in the 'care' required of a physician anywhere; the idea of a differentiation in locality seems to have originated in years past. . . .[33]

The court noted, however, that it had no quarrel with the inclusion of the element of "similar locality" in the requirements for due care because "the physician

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25. *Id.* at 213, 85 S.W. at 1119. The court quoted 22 AM. & ENG. ENC. LAW 798 (2d ed. 1905).

26. Sibert v. Boger, 260 S.W.2d 569 (Mo. 1953). Reed v. Laughlin, 332 Mo. 424, 58 S.W.2d 440 (1933). Cazzell v. Schofield, 319 Mo. 1169, 8 S.W.2d 580 (1928).

27. Owens v. McCleary, 313 Mo. 213, 281 S.W. 682 (1926), rectal specialist; Spain v. Burch, 169 Mo. App. 94, 154 S.W. 172 (Spr. Ct. App. 1913), anesthesiologist.

28. Seewald v. Gentry, 220 Mo. App. 367, 286 S.W. 445 (Spr. Ct. App. 1926); Gore v. Brockman, 138 Mo. App. 231, 119 S.W. 1082 (K. C. Ct. App. 1909).

29. 138 Mo. App. 231, 119 S.W. 1082 (K. C. Ct. App. 1909).

30. *Id.* at 237, 119 S.W. at 1083.

31. Evans v. Clapp, 231 S.W. 79 (K. C. Ct. App. 1921). The defendant, from the small town of Moberly, fluoroscoped the plaintiff's abdomen repeatedly, at times displaying the scene to his wife and her friends. These repeated exposures to dangerous X-ray radiation caused severe, painful burns down plaintiff's back and spinal column. The court decided:

> It would seem that the ordinary care required in the use of the X-ray agency (a dangerous thing if not properly used) would not be quite subject to the distinction usually made between ordinary medical practice in a rural and in a city community. . . .

Id. at 86.

32. 316 S.W.2d 505 (Mo. 1958).

33. *Id.* at 510 (citations omitted).

everywhere is required to exercise not only reasonable 'care', but also the 'skill' which he possesses."[34]

It seems that the court in *Williams* was of the opinion that the locality of the defendant's practice should be only one of the circumstances in the formula for determining a physician's negligence. Using the court's reasoning, the only practical significance of the locality of practice would be as an indication of the skill which the physician might possess. If he in fact has greater skill than his locality would indicate, he is required to exercise that greater skill. In other words, locality would help set the *minimum* amount of skill required, but not the *maximum.* Dicta in supreme court cases subsequent to *Williams* tend to support this view.[35]

The supreme court did, however, adopt as an approved jury instruction a definition of negligence in malpractice cases which contains the limiting phrase "practicing in similar localities."[36] Although the Missouri Approved Jury Instructions cites *Williams* in support of section 11.06, the section's definition does not correspond to the recent indications by the court that locality of practice should be only one of the circumstances considered rather than a limiting factor in its own right. The phrase was undoubtedly included in the definition to inform the jury that the *skill* which the defendant possessed might in fact depend upon his locality of practice. Its inclusion, however, might tend to mislead the jury into thinking that the *care* with which the skill is used also depends upon the locality of practice. The supreme court in *Williams v. Chamberlain* indicated its desire to avoid this latter construction.

Since its inception the locality rule has been so modified and explained that the trend away from the postulate seems pronounced and clear. *Brune v. Belinkoff* is only another decision following this trend. The rule's demise in all jurisdictions is certain to come as transportation, medical education, and the availability of medical facilities continue to improve. The Missouri Supreme Court is disposed to follow the course taken in *Brune,* if it has not in fact already done so. It is evident from the court's statements in *Williams* that the care required of a physician or surgeon should not vary from place to place, but that the special skill which a physician in fact possesses might be indicated by some reference to the locality of his practice. This is a distinction which American courts have often not clearly made, and this failure may have given the locality rule more force than it was ever worth. Section 11.06 of the Missouri Approved Jury Instructions should be revised to reflect this view by removing any reference to locality. The significance of the locality of practice in a particular malpractice case should be left for closing argument.

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34. *Id.* at 510.

35. Hart v. Steele, 416 S.W.2d 927, 931 (Mo. 1967); Fisher v. Wilkinson, 382 S.W.2d 627, 630 (Mo. 1964); Rauschelbach v. Benincasa, 372 S.W.2d 120, 124 (Mo. 1963).

36. Mo. Approved Instr. 11.06 (1964) reads:
Definition-Negligence-Physicians and Surgeons: The term "negligence" as used in this [these] instruction[s] means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of defendant's profession in good standing practicing in similar localities.